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THE LAW ASSOCIATION OF PHILADELPHIA.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~325~~ 68

JOHN N. WHITNEY, APPELLANT,

vs.

MOYLAN C. FOX, SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOAB LAWRENCE, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED FEBRUARY 12, 1894.

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a In the Supreme Court of Utah Territory.

JOHN N. WHITNEY, Plaintiff & Appellant,
vs.
MOYLAN C. FOX and SARAH M. LAWRENCE, Executors of the Last Will and Testament of Joab Lawrence, Deceased, Respondents.

Transcript.

Filed in the supreme court May 14, 1892, at Salt Lake City, Utah.
JOS. P. BACHE, *Clerk.*

1 In the District Court of the Third Judicial District of Utah. Territory.

JOHN N. WHITNEY, Plaintiff,
vs.
MOYLAN C. FOX and SARAH M. LAWRENCE, Executors of the Last Will and Testament of Joab Lawrence, Deceased, Defendants.

Complaint.

The said plaintiff complains of the defendants, and alleges that the deceased, Joab Lawrence, died in the city and county of Salt Lake, Territory of Utah, on or about the 28th day of December, 1888; that he died testate, leaving a will which has since been probated in the probate court of the county of Salt Lake, and that the defendants, Moylan C. Fox and Sarah M. Lawrence, have
2 been appointed executor and executrix of the said last will and testament of Joab Lawrence, and have qualified and entered upon the discharge of their duties as such executors, and are now the acting executors of said estate.

Plaintiff further alleges that on or about and prior to the 7th day of October, 1872, he was the owner of 250 shares of the capital stock of the Eureka Mining Company of Utah; that the said deceased, Joab Lawrence, was the owner of at least 1,500 shares of the capital stock of said mining company.

That prior to said day this plaintiff delivered to the said deceased, Joab Lawrence, certificates of his stock, representing 250 shares of said stock, standing in his name on the books of the company, said Eureka Mining Company, of Utah; said certificates being endorsed in blank; that he delivered the same to the deceased to be disposed of with the stock of the said deceased, and for their joint benefit.

That the said deceased, Joab Lawrence, on or about the day and year aforesaid, did sell and dispose of the said stock of his own and of this plaintiff to one Eber B. Ward, of Detroit, Mich.; that as a part of the consideration for said sale he received certain real property, situate, lying and being in the city of Detroit, Mich., consisting of three city lots, and a building or hotel erected thereon, and

monly known and designated as the Mansion House property,
3 which last-named property is more particularly described as follows, to wit:

That the said deceased, Joab Lawrence, procured the deed to the said real property, to be taken to him (the said Lawrence) individually, in his own name; that the same has since been recorded, and that the said deceased now stands the owner of record of the title to said Mansion House property.

That in truth the consideration for the said Mansion House property was the sale of the said shares of stock, of which the said plaintiff was a part owner.

That the said plaintiff was the owner of one-eighth of said shares of stock thus traded to the said Eber B. Ward.

That the said sale and exchange was really (although not appearing of record) in trust for this plaintiff, to the extent of one-eighth interest, and the said deed, although absolute on its face, was in truth and in fact secretly charged with a trust, in favor of this plaintiff, to the extent of his one-eighth interest therein, he having furnished purchase-money to that amount for the purchase of the said Mansion House property.

That the said Lawrence, deceased, also received for the said shares of stock large amounts of other property, among other things
4 a large amount of cash in hand, a part of which was invested in taking up an indebtedness against the said Eureka Mining Co., which was a corporation existing and doing business under and by virtue of the laws of the Territory of Utah.

That the said amount of cash thus used was $23,587.50; so that of the said proceeds of the said sale of stock, the said Lawrence received the amount of $23,587.50 in the form of an indebtedness against the said company, one-eighth of which belonged to, and was the property of this plaintiff.

That in recognition of the said trust in favor of this plaintiff, in the said Mansion House property, and of the said $23,587.50, the said Joab Lawrence executed and delivered to this plaintiff, on the 9th day of November, 1872, the following declaration of trust, to wit:

"SALT LAKE CITY, *Nov. 9th*, 1872.

"John N. Whitney:

"This is to certify that you are entitled to one-eighth interest in the real estate, mining and rolling-mill stocks, and in the $23,587.50 of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7th, less the farm of 160 acres which was given to A. A. Griffith. I have received of you twenty shares of Eureka stock, your one-eighth of the 160 shares, which was given to Messrs. Griffith & Mayhue.

"JOAB LAWRENCE."

5 Plaintiff further alleges that afterwards said Eureka Mining Co. of Utah executed a certain mortgage to secure the [illegible] $23,587.50, and also other $20,000, the

total amount of said mortgage being $43,587.50, to one Theodore M. Tracy, trustee, the said Tracy holding the said mortgage and the promissory note connected therewith, as trustee for the said Joab Lawrence. That the note was dated September 15th, 1872, and the said mortgage the 9th day of November, 1872.

Plaintiff further shows that the said other $20,000, which the said mortgage was given to secure, was for $20,000, voted by the directors of the Eureka Mining Co. for services to the said Lawrence, deceased (to one W. H. Wood, who was a director, and to this plaintiff, John N. Whitney). That the amount thus voted was to Joab Lawrence, $9,000; to W. H. Wood, $5,500, and to plaintiff, J. N. Whitney, $5,500, the said plaintiff having been a director and vice-president of said company, and having rendered it services for which the said money was voted.

That the said three items of salary account, amounting to $20,000, and the other $23,587.50 constituted the consideration and face of the said mortgage, or $43,587.50.

6 That the said account was never paid by the said company in money to this plaintiff, but was included in the said mortgage to Theodore F. Tracy.

That the said mortgage was afterwards, and prior to the 26th day of August, 1874, assigned by the said Theodore F. Tracy to the said deceased, Joab Lawrence, who received the same in trust for plaintiff to the extent of his interest therein, to wit: for one-eighth of $23,587.50 and for the said $5,500.

Plaintiff further alleges, that on the day and year last mentioned, the said deceased, Joab Lawrence, took proceedings to foreclose the said mortgage in the first district court of Utah Territory, where the property upon which the said mortgage was a lien was situate, and such proceedings were had in said cause—

That on the 27th day of July, 1876, a decree was duly made and entered, foreclosing the equity and redemption of the said mining property and said premises, and decreeing a sale thereof.

That thereafter, in pursuance of the said foreclosure and decree, the said property and premises were sold, on the 9th day of September, 1876, and conveyed to the said Joab Lawrence, deceased, individually, by deed dated the 13th day of March, 1877, and recorded in the office of the county recorder of Juab county, Utah, on the 27th day of March, 1877. Book "C."

7 That thereafter such negotiations were had, that all the right, title and interest which the said deceased, Joab Lawrence, had acquired by reason of such decree of foreclosure and sale therein, and as a beneficial owner in said trust deed, was conveyed by the said deceased to the Eureka Hill Mining Company, a corporation organized and doing business under and by virtue of the laws of the Territory of Utah; that such conveyance was by deed, dated the 14th day of March, 1877, and recorded in the office of the county recorder of Juab county, Utah, on the 27th day of March, 1877, in Book "C," and that the consideration for the said transfer was three-tenths of the entire capital stock of the said Eureka Hill Mining Co., to wit: 3,000 shares of the capital stock of said com-

pany, its entire capital stock being 10,000 shares, of the par value of $100 each.

That said 3,000 shares were issued by the said company to the said deceased in compromise and consideration of the conveyance to it of all the rights acquired by the said deceased under and by virtue of the said mortgage of $43,587.50.

That through all these transactions the said deceased was acting not only in his own behalf but also in behalf and for the use of this plaintiff to the extent of the interest of this plaintiff, in and to the said mortgage, which was the amount of one-eighth of the said $43,587.50, and the amount of said salary account, $5,500, making a total of $8,198.43; and the said Lawrence, deceased, held
8 the certificate as trustee for the said plaintiff, to the extent of said interest, amounting to 564 and $\frac{218}{100}$ shares.

Plaintiff further alleges that he is informed and believes that the said Eureka Hill Mining Co. has, from time to time, declared dividends upon its capital stock. That the dividends declared, since the said Lawrence received the said shares of stock as aforesaid, and prior to his decease, amounted to $94 per share. That the same have been declared on the following dates, to wit:

1879.		
August 2	$1 00	per share.
September 15	1 00	"
October 15	1 00	"
1882.		
February 23	3 00	"
October 11	2 00	"
1883.		
March 17	2 00	"
June 4	2 00	"
July 17	2 00	"
August 1	2 00	"
August 25	2 00	"
August 22	2 00	"
November 1	2 00	"
December 5	2 00	"
1884.		
January 8	2 00	"
February 1	2 00	"
March 1	2 00	"
January 5	2 00	"
September 24	2 00	"
November 12	2 00	"
December 10	2 00	"
9 1885.		
January 6	5 00	per share.
February 3	5 00	"
[illegible]	2 00	"
[illegible]	2 00	"
[illegible]	2 00	"

1886.		
February 16	4 00	per share.
September 5	2 00	"
December 6	2 00	"
1887.		
February 7	3 00	"
April 4	2 00	"
July 6	2 00	"
September 5	2 00	"
October 6	2 00	"
November 7	2 00	"
December 5	2 00	"
1888.		
January 2	2 00	"
February 6	5 00	"
March 5	2 00	"
May 7	2 00	"
August 6	4 00	"
September 3	2 00	"
Total dividends declared	$94 00	"

That plaintiff further alleges, on information and belief, that the said Lawrence, deceased, received the said dividends that were declared prior to the first day of April, 1888, and that he had right to, and his executors now claim the remainder of the said dividends; that they are now in the hands of the said company, and have not yet been paid over to the said deceased, or to his executors.

Plaintiff further alleges that the said Eureka Hill Mining Co. is very prosperous, is doing a large business, has a large amount of property, and that the shares are very valuable, to wit: of the value of at least $100 per share, and that the said company are now so conducting the business that dividends will be continually accruing, and will be declared in the future.

Plaintiff further alleges that there never has been any accounting, settlement or examination of the affairs of the said trustship between said deceased, Joab Lawrence and this plaintiff prior to his decease. That the said plaintiff had never demanded a settlement of the said trustship until the spring of 1888; that he then demanded a settlement of the said trust matters, which was denied, and suit brought to enforce the same in the supreme court of the city and county of New York. That said suit was undetermined at the time of the death of the said Lawrence, and abated by his death.

Plaintiff further shows that he did not for many years know of the value and business done by the Eureka Hill Mining Co., or the amount of dividends that had been declared by them; and it was only recently that he heard that they were declaring large dividends, and then at his first opportunity he demanded a settlement thereof.

Plaintiff further shows that the said deceased, up to the time of his death, received all the rents, issues and profits of the said real estate situate in the city of Detroit, Michigan, and that the
11 amount thereof is unknown to this plaintiff; that the title to said real estate at the time of his said decease stood in the name of said Lawrence; and plaintiff is fearful, unless restrained by this court, that the said executors may dispose of the said real estate, and of the said shares of stock.

Plaintiff further shows that the said defendants, the executors of the estate of said Lawrence, deceased, deny that the said land and the said shares of stock are, or ever were, held in trust by the said deceased, in whole or in part, for this plaintiff, and have caused the same to be inventoried as the property of the said deceased, and threaten to settle the said estate, and divide and distribute the said property in violation of the said rights of this plaintiff, as if the whole thereof belonged to the said Lawrence, deceased, and as if this plaintiff had no interest therein.

That on or about the second day of September, 1889, this plaintiff presented his claim, in writing to the said executors, a copy of which is hereto annexed, and made a part hereof, marked Exhibit No. 1; that on or about the third day of September, 1889, the said executors rejected the said claim.

Wherefore, this plaintiff demands judgment:

1st. That this plaintiff be decreed to be the equitable owner, and entitled to one-eighth of the said Mansion House property in Detroit, Michigan, and to the rents, issues and profits thereof, and to
12 the 564 and $\frac{216}{1000}$ shares of the said 3,000 shares of the Eureka Hill Mining Co. stock, and to all the dividends that have heretofore been declared thereon.

2d. That the said executors be required to account to this plaintiff for all the rents, issues and profits received by the said deceased upon the said Mansion House property, since the said 7th day of October, 1872, and for all the dividends received by the said deceased, Joab Lawrence, on the said 564 and $\frac{216}{1000}$ shares of stock of the Eureka Hill Mining Company, and the interest thereon.

3d. That the said executors be required to convey to this plaintiff, by good and sufficient deed, one-eighth undivided interest in the said Mansion House property, in the city of Detroit, Michigan.

4th. That the said executors be required to assign to this plaintiff of the said shares of stock of the Eureka Mining Company, the amount belonging to him, in pursuance of the said trust, to wit: 564 and $\frac{216}{1000}$ shares.

5th. That a receiver be appointed of the entire amount of the said shares of stock held in trust in part for this plaintiff by the said deceased, Joab Lawrence, to wit: the said 3,000 shares of stock to receive the dividends thereon, and to hold the same for the satisfaction of any decree that this plaintiff may be decreed to be
13 entitled to recover. And that the said receiver may be also authorized to receive the rents, issues and profits of the said Mansion House property in the city of Detroit.

6th. That during the pendency of this action the defendants, the

said executors, their agents, servants and employees, may be enjoined and restrained from selling, or disposing of, or parting, or interfering with the said real property, or the said personal property, the shares of stock in the said Eureka Hill Mining Company, until otherwise ordered and directed by this court.

7th. That the plaintiff have such other and further relief as this court may deem just, together with the costs of this action.

ARTHUR BROWN,
J. G. SUTHERLAND,
Attorneys for Plaintiff.

Verification by plaintiff.

14 In the Probate Court in and for Salt Lake County, Utah Territory.

In the Matter of the Estate of JOAB LAWRENCE, Deceased.

Demand for Allowance of Claim.

To Moylan C. Fox and Sarah M. Lawrence, executors of said estate:

John N. Whitney hereby presents the following claim against the estate of Joab Lawrence, deceased, and demands its allowance by the executors:

1. To an undivided interest in 3,000 shares of the stock of the Eureka Hill Mining Company, held in trust by Joab Lawrence at the time of his death for the said John N. Whitney, and for himself (the said Lawrence) and for others; the amount of the interest of the said Whitney being represented by his proportion of the amount of a certain mortgage, bearing date the 9th day of November, 1872, executed by the Eureka Mining Company of Utah, to one Theodore F. Tracy, trustee, to secure the sum of $43,587.50.

That of the said last-named sum, the said John N. Whitney was the owner in equity of $8,198.43.

15 That said Joab Lawrence received the said 3,000 shares of stock of the Eureka Hill Mining Company in compromise and foreclosure of the said mortgage, and the interest of the said Whitney in the said stock would be in the proportion of the said sum of $8,198.43 to $43,587.50.

Number of shares belonging to Whitney, for which demand is hereby made, and an accounting for the proceeds, dividends and interest thereof, 564 and $\frac{216}{1000}$ shares.

2. To a portion of the dividends received by Joab Lawrence, as trustee, on 3,000 shares of stock of the Eureka Hill Mining Company, held in trust for Whitney and others, as set forth in item No. 1; the proportion of dividends to which said Whitney is entitled being as $8,198.43 is to $43,587.50.

The whole amount of dividends received by Lawrence, principal, $310,000.00.

The amount of dividends to which John N. Whitney is entitled, $58,302.

For which demand is made, and interest on the same, same proportion as above, at the date the said dividends were received by Lawrence, which is as follows:

1879.		
August 2	$1 00	per share.
September 15	1 00	"
October 15	1 00	"
1882.		
February 23	3 00	"
October 11	2 00	"
16 1883.		
March 17	2 00	per share.
June 4	2 00	"
July 17	2 00	"
August 1	2 00	"
August 25	2 00	"
August 22	2 00	"
November 1	2 00	"
December 5	2 00	"
1884.		
January 8	2 00	"
February 1	2 00	"
March 1	2 00	"
January 5	2 00	"
September 24	2 00	"
November 12	2 00	"
December 10	2 00	"
1885.		
January 6	5 00	"
February 3	5 00	"
April 6	2 00	"
June 1	2 00	"
September 7	2 00	"
1886.		
February 16	4 00	"
September 5	2 00	"
December 6	2 00	"
1887.		
February 7	3 00	"
April 4	2 00	"
July 6	2 00	"
September 5	2 00	"
October 6	2 00	"
November 7	2 00	"
December 5	2 00	"

1888.

January 2	2 00	per share.
February 6	5 00	"
March 5	2 00	"
May 7	2 00	"
August 6	4 00	"
September 3	2 00	"
Total dividends declared	$94 00	"

17 Interest due Whitney, $20,000.

3. To an undivided one-eighth of the property situate in the city of Detroit, Michigan, known as the Mansion House property, for the conveyance of which from the executors this claimant now makes demand, and for the rents, issues and profits thereof to be accounted for by executors.

All of the foregoing property was held by the deceased at the time of his death as trustee for this claimant, in the proportion hereinbefore set forth, and in part by virtue of a written declaration of trust now in the hands of the claimant.

JOHN N. WHITNEY.

(Verified by claimant.)

Endorsements on back of complaint: 7982. Title of court and cause. Filed September 24th, 1889. Henry G. McMillan, clerk, by Fergus Ferguson, deputy. Issued September 24, 1889. Arthur Brown, attorney for plaintiff.

(Title of Court and Cause.)

Answer.

Now comes the defendants above named, and for answer to the complaint in the above-entitled action allege that they have
18 no information or belief sufficient to enable them to answer whether said plaintiff was, on or about the 7th day of October, 1872, or at any other time, the owner of 250 shares, or any other number of shares of the capital stock of the Eureka Mining Company of Utah, and on that ground they deny that said plaintiff was ever the owner of any shares of said capital stock.

Said defendants admit that on the 7th day of October, 1872, their testator, Joab Lawrence, was the owner of not only 1,500 shares of said capital stock, and allege that he was then the owner of about 2,200 shares of said stock.

Said defendants allege that they have no information or belief sufficient to enable them to answer whether prior to the date last aforesaid, or at any other time, said plaintiff delivered to said Joab Lawrence certificates of his (plaintiff's) stock, representing 250 shares, or any other number of shares of said stock, to be disposed of with the stock of said Joab Lawrence for the joint benefit of said plaintiff and said Joab Lawrence, or whether if any such stock was

so delivered the same stood in plaintiff's name on the books of said company, or whether said stock if any such were so delivered, was endorsed in blank or otherwise; and for want of any such information or belief said defendants deny that said plaintiff ever delivered to said Joab Lawrence any certificates of his (plaintiff's)
19 stock, representing any number of shares of said stock, standing in plaintiff's name on the books of said company, or otherwise, or endorsed in blank, or otherwise, to be disposed of with the stock of the said Joab Lawrence for the joint benefit of said plaintiff and said Lawrence, or otherwise, or at all.

Said defendants admit that on or about the 7th day of October, 1872, said Joab Lawrence did sell and dispose of certain shares of said capital stock to Eber B. Ward, and that as a part of the consideration for said sale received the real property mentioned in said complaint, but said defendants have no information or belief sufficient to enable them to answer whether any of the stock so sold and disposed of to the said Ward was the stock of said plaintiff, and for want of such information or belief said defendants deny that any of said stock belonged to said plaintiff, in whole or in part, and upon the same ground said defendants deny that said plaintiff was the owner of one-eighth of said shares, or of any other proportion thereof, or that he furnished one-eighth or any other part of the purchase-money for the purchase of said real property.

Said defendants, upon information and belief, deny that the sale of stock to said Ward, and the receiving by said Lawrence of said real property in exchange therefor, was in trust for said
20 plaintiff to the extent of one-eighth or any other interest, or that the deed for said real property mentioned in said complaint was in trust, or in fact secretly, or otherwise, charged with any trust whatever in favor of said plaintiff.

Said defendants have no information or belief sufficient to enable them to answer whether said Joab Lawrence, of the moneys received from said Ward for the sale of shares of said capital stock as aforesaid, invested $23,587.50, or any other sum in taking up an indebtedness against the said Eureka Mining Company, or whether the said Lawrence received $23,587.50, or any other sum or portion of the proceeds of the sale of shares of said capital stock to said Ward, in the form of an indebtedness against said company; or if so, whether any portion of said indebtedness belonged to or was the property of said plaintiff, and for want of such information or belief said defendants deny that said Joab Lawrence invested $23,587.50, or any other sum, being the proceeds of such sale, in taking up any indebtedness against said company, or that he received $23,587.50, or any other sum or portion of the proceeds of such sale in the form of an indebtedness against said company, and if there was any investment by the said Lawrence of any of the proceeds of such sale in any indebtedness against said company, said defendants, for
21 want of such information or belief, deny that any part thereof belonged to or was the property of said plaintiff. Said defendants allege that they have no information or belief sufficient to enable them to answer whether the said Joab Lawrence, in recog-

nition of the alleged trust mentioned in said complaint in favor of said plaintiff, or otherwise, executed or delivered to said plaintiff, on the 9th day of November, 1872, or at any other time, the alleged declaration of trust set forth in said complaint; and for want of such information or belief said defendants deny that said Joab Lawrence at any time executed or delivered to said plaintiff said alleged declaration of trust.

Said defendants admit that said Eureka Mining Co. executed to Theodore F. Tracy, trustee, a certain mortgage to secure an indebtedness of $43,587.50, and that the said Tracy held the said mortgage and the promissory note connected therewith, as trustee for the said Joab Lawrence; and that said note and mortgage were respectively dated as in said complaint alleged; but said defendants allege that they have no information or belief sufficient to enable them to answer whether or not $23,587.50, or any other sum or part of said indebtedness of $43,587.50, to secure which said mortgage was given as aforesaid, was acquired by said Joab Lawrence, as alleged in said complaint, or, if so, whether or not said plaintiff had any interest therein; and, for want of such information or
22 belief, they deny, as they have before denied, that the same was so acquired, or that said plaintiff has now or ever had any interest therein, or in any part thereof.

That said defendants admit that the directors of said Eureka Mining Company voted to said Joab Lawrence $9,000, to W. H. Wood $5,500, and to said plaintiff $5,500, for services as in said complaint alleged; but defendants, upon information and belief, deny that any part of either of said sums went into or was secured by said mortgage, or that said three items of salary account, or any part thereof, constituted any part of the consideration of said mortgage.

Said defendants, upon information and belief, deny that the said sum of $5,500, voted to said plaintiff as aforesaid, was never paid by the said company to said plaintiff in money; on the contrary, said defendants allege, upon information and belief, that the same was fully paid to said plaintiff in money, and deny, upon information and belief, that any part thereof was included in said mortgage.

Said defendants admit that said mortgage was assigned by said Theodore F. Tracy to said Joab Lawrence as in said complaint alleged, but defendants allege that they have no information or belief sufficient to enable them to answer whether or not said Lawrence received the same in trust for said plaintiff to the extent of one-eighth of $23,587.50, or any other sum, or whether
23 or not said plaintiff had any interest therein, and for want of such information or belief they deny that said Lawrence received the same in trust for plaintiff to the extent aforesaid, or to any extent, or at all, or that said plaintiff had any interest therein. Said defendants, upon information and belief, deny that said Lawrence received said mortgage in trust for plaintiff to the extent of said other sum of $5,500, as alleged in said complaint, or any part thereof. Said defendants admit that said Joab Lawrence took pro-

ceedings to foreclose said mortgage, that the same was foreclosed and the mortgaged premises, in pursuance of the decree of foreclosure were sold, and the same were conveyed to said Lawrence pursuant to such sale, as alleged in said complaint; but defendants allege that they have no information or belief sufficient to enable them to answer whether or not in taking such proceedings, or in obtaining such foreclosure or in procuring such sale or conveyance, the said Joab Lawrence was acting not only in his own behalf but in behalf also and for the use of said plaintiff to the extent mentioned in said complaint, or to any extent, or whether said plaintiff had any interest in said mortgage; and, for want of such information or belief, they deny that said Lawrence in taking proceedings to foreclose said mortgage, or in obtaining such foreclosure,
24 or in procuring such sale or conveyance was acting at all in behalf of or for the use of said plaintiff, or that said plaintiff had any interest whatever in said mortgage.

Said defendants admit that the said Joab Lawrence, after said conveyance to him of said mortgage premises, conveyed the same to the Eureka Hill Mining Company, as alleged in said complaint, and that he received as the consideration for said transfer and conveyance 3,000 shares of the capital stock of said last-named company; but defendants upon information and belief deny that in conveying said premises to said Eureka Hill Mining Company, or in accepting and receiving said 3,000 shares of said stock in consideration therefor, said Lawrence was acting at all in behalf of, or for the use of said plaintiff. Said defendants deny upon information and belief that said Lawrence ever received or held any part of said 3,000 shares of stock, or any certificates thereof, or of any part thereof, as trustee for said plaintiff to the extent mentioned in said complaint, or to any extent whatsoever.

Said defendants deny upon information and belief that said plaintiff did not for many years know of the value and business done by the Eureka Hill Mining Company, or the amount of dividends that had been declared by it, or that it was only recently that he heard that said company was declaring large dividends. On the
25 contrary, defendants allege upon information and belief that said plaintiff for at least four years last past has known all about the business of said Eureka Hill Mining Company, that is, so far as the declaration and payment of dividends by said company is concerned. And defendants allege that had said plaintiff given the slightest attention to or taken any interest whatever in the matter, he might readily have ascertained at any time since the conveyance to said Eureka Hill Mining Co. by said Lawrence of said mortgaged premises, full knowledge as to the dividends from time to time declared by said company.

Said defendants deny, upon information and belief, that said plaintiff, at his first opportunity, after he learned that said Eureka Hill Mining Co. was declaring large dividends, demanded a settlement thereof from said Lawrence; on the contrary defendants allege, on information and belief, that for a long time, to wit: for more than three years after said plaintiff heard that said company

was declaring large dividends, he made no such demands, although he had ample opportunity repeatedly so to do had he so desired.

And for a further answer and defense to said action, in so far as it is sought thereby to establish a trust in favor of said plaintiff in the real estate situate in the State of Michigan and described in said complaint, and to obtain an accounting of the rents, issues and profits thereof, said defendants allege, upon information and
26 belief, that in and by the laws of the State of Michigan, in force during all the times mentioned in said complaint, and still in force, it is provided that "No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing."

And said defendants upon information and belief, further allege that in and by the laws of said State in force during all the times mentioned in said complaint, and still in force, it is provided that: "Where a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section," which said next section provides that, "Every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration and where a fraudulent intent is not disproved a trust shall result in favor of such
27 creditors to the extent that may be necessary to satisfy their just demands."

And said defendants further allege, upon information and belief, that no trust whatever in or concerning said real estate or any interest therein was ever created or declared by the said Joab Lawrence, in favor of said plaintiff, by any deed or conveyance in writing subscribed by the said Lawrence, or by any person thereunto by him authorized in writing; and for a further answer and defense to said action in so far as it is sought thereby to establish a trust in favor of said plaintiff in the real estate, situate in the State of Michigan, and described in said complaint, and to obtain an accounting of the rents, issues and profits thereof, said defendants allege that the said cause of action is barred by the provisions of sec. 219 of the Code of Civil Procedure of Utah Territory.

And for a further answer and defense to said action, in so far as it is sought thereby to establish a trust in favor of said plaintiff in the real estate situate in the State of Michigan, and described in said complaint, and to obtain an accounting of the rents, issues and profits thereof, said defendants say that said plaintiff ought not to have or maintain said action against them, because, as they are informed and believe, and upon such information and belief aver

that for more than seven years next preceding the death of
28 the said Joab Lawrence, that is to say, from the month of February, 1872, to the time of his death he, the said Lawrence, had and held the continuous, open, notorious, peaceable, exclusive and adverse possession of all said real estate, claiming the same during all the period last aforesaid, absolutely, and as his own property, solely, adversely to said plaintiff and to all the world, free and clear of any and all manner of trusts in favor of said plaintiff or any other person, and during all the period last aforesaid, had collected, received and retained all the rents, issues and profits of said real estate to his own use, and as his own property, claiming the same adversely to said plaintiff and all other persons; and that at no time during the whole of the period last aforesaid did the said Joab Lawrence recognize or acknowledge any trust or interest whatever in said plaintiff, in said real estate, or any part thereof, or in any of said rents, issues or profits.

And as a further answer and defense to said action, in so far as it is sought thereby to establish a trust in favor of said plaintiff in the 3,000 shares of stock, mentioned in said complaint, or any part thereof, or to obtain a judgment of this court decreeing plaintiff to be the equitable owner of 565 and $\frac{216}{1000}$ shares of the said 3,000 shares of stock, and to all dividends declared thereon prior
29 to the commencement of said action, and to obtain an accounting of all such dividends, said defendants say, that said plaintiff ought not to have or maintain said action against them, because, as they are informed and believe, and upon such information and belief aver, for more than three years next preceding the death of said Joab Lawrence, that is to say, from, to wit: the 17th day of March, 1877, to the time of his death, he, the said Lawrence, had and held the exclusive possession of said 3,000 shares of stock and the whole thereof continuously, claiming the same during all the period last aforesaid absolutely, and as his own property solely, adversely to said plaintiff and all others, free and clear of any and all manner of trusts in favor of said plaintiff, or any other person, and during all the period last aforesaid had collected, received and retained, to his own use and as his own property solely, all dividends declared upon said stock and every share thereof, as the same were, from time to time, declared, claiming the same adversely to said plaintiff and all others, and that at no time during the whole of said period last aforesaid did the said Joab Lawrence recognize or acknowledge any trust or interest whatever in said plaintiff in said 3,000 shares of stock, or any part thereof, or in any of the dividends declared thereon.

And as a further answer and defense to said action, said
30 defendants allege, that the said action is barred by the provisions of section 201 of the Code of Civil Procedure of Utah.

And as a further answer and defense to said action, said defendants say that said plaintiff ought not to have or maintain said action against them because they aver that they are informed and believe, and upon such information and belief allege, that from the year 1872 until the death of said Joab Lawrence, he, the said Law-

rence, was in the open, continuous and exclusive possession of all the real estate mentioned in said complaint and therein described as the Mansion House property, and during all said period paid all taxes and expenses of repairs thereon, and collected, received and retained to his own use all the rents, issues and profits thereof. That at no time during the whole of the period last aforesaid, did the said Lawrence recognize or acknowledge any trust or interest in said plaintiff in said real estate, or any part thereof, or in any of said rents, issues or profits. That from the 17th day of March, 1877, until the time of his death, the said Lawrence had and held the exclusive possession of the 3,000 shares of the capital stock of the Eureka Hill Mining Company, mentioned in said complaint and the whole thereof. That during all period last aforesaid, all said 3,000 shares stood in the name of the said Lawrence on the books of said company. That at no time during the whole of said
31 period did the said Lawrence, in any manner, recognize, acknowledge or admit any trust or interest in said plaintiff in said stock, or in any part thereof, or in or to any part of the dividends declared thereon as in said complaint alleged, but from time to time as said dividends were declared, he, the said Lawrence, collected, received and retained the same to his own use.

That during the years 1877, 1878, 1879, and 1880 there were no dividends declared or paid on said stock. On the contrary, in each of the years 1877, 1878, 1879 and 1880, the business of said Eureka Hill Mining Company was carried on at a loss. And said Lawrence as such stockholder therein was forced to pay and lay out and expend during each of the years last aforesaid a large sum of money, amounting in the aggregate to the sum of $29,000 to enable said Eureka Hill Mining Company to carry on its business of prospecting and developing its mining property, said sum of $29,000, being his proportion as the owner of 3,000 shares of the capital stock of said company, of the total amount used and necessary to be used by said company during the years 1877, 1878, 1879 and 1880 in carrying on its business aforesaid, over and above all moneys earned or realized by said company during said years.

Said defendants further allege that had the said plaintiff given any attention whatever, or taken any interest in the matter, he might readily have ascertained at any time all about the
32 financial status of said company, as well when its business was being carried on at a loss as aforesaid, as when it was earning and declaring dividends upon its capital stock. And said defendants aver that they are informed and believe, and upon such information and belief allege, that said plaintiff has known ever since the year 1877, when said company's said business was being conducted at a loss as aforesaid, as well as when it was earning, declaring and paying dividends upon its said stock, and also that said Lawrence was from time to time, as the same were declared, collecting, receiving and retaining to his own use all such dividends on said 3,000 shares of said stock, and has at all times since the year 1877, known that the said Lawrence was collecting, receiving and

retaining to his own use the rents, issues and profits of said real estate as aforesaid.

That from the year 1872 until the year 1886, the said Joab Lawrence resided in the city of Salt Lake, Territory of Utah, and during all the period last aforesaid was rarely absent therefrom, and when absent such absence would only extend for a few weeks at a time; that during the year 1886, and from thence until his death he lived a portion of the time in the city of New York, State of New York, and the balance in said city of Salt Lake.

That defendants are informed and believe, and upon such
33 information and belief allege, that from the year 1872 until the year 1883, said plaintiff lived almost constantly in the city of Salt Lake. That during all the period last aforesaid he was well and intimately acquainted with said Lawrence, saw him almost weekly and frequently met and conversed with him. That since the year 1883 said plaintiff has lived in said city of Salt Lake about one-half the time and the balance in Evanston, Wyoming Territory, which is but a few hours' travel from said city of Salt Lake. And from the year 1883 until the death of said Lawrence said plaintiff met said Lawrence a number of times and conversed with him.

That during the year 1887 the mind and memory of the said Joab Lawrence became and was so impaired by disease, that it was impossible for him to attend to the most ordinary business matters, and that from thence until his death the aforesaid malady of his mind gradually increased. That from the last of the year 1887 until his death his mental condition was such that he could not comprehend any matter of business submitted to him, however simple. That prior to the commencement by the plaintiff in the supreme court of the city of New York of the suit against said Joab Lawrence, mentioned and referred to in said complaint, he, said plaintiff, well knew that the mind and memory of the said Lawrence were destroyed as aforesaid; and defendants further allege
34 upon information and belief that said plaintiff never asked for or demanded from said Lawrence any settlement or accounting of any of the matters alleged in said complaint as the cause of action, or claimed or pretended that he had right, title or interest, legal or equitable, in or to any of said real estate, or in or to any of the rents, issues or profits thereof, or in or to any part or portion of said 3,000 shares of stock, or in or to any of the said dividends until after he, said plaintiff, well knew that the mind and memory of said Lawrence was destroyed by disease, as aforesaid.

And, upon information and belief, defendants allege that the negligence and laches of said plaintiff, under the facts and circumstances aforesaid, are such as to preclude plaintiff from any relief in equity.

Wherefore, having fully answered, defendants demand judgment that they be hence dismissed with their costs in this behalf incurred.

BENNETT, MARSHALL & BRADLEY AND
W. H. DICKSON, *Attorneys for Defendants.*

(Verification by Moylan C. Fox.)

Endorsements: Service of the within answer made upon us this 31st day of October, 1889. J. G. Sutherland, per Judd, plaintiff's attorneys, and filed October 31st, 1889. Henry G. McMillan, clerk, by Fergus Ferguson, deputy.

35 (Title of Court and Cause.)

This cause coming on regularly for hearing before the court on the 25th day of June, A. D. 1890, both parties appearing by their respective attorneys, and the court having heard the proofs of the respective parties, plaintiff and defendants, and the argument of counsel thereon, and the cause having been submitted to the court for decision, the court now finds the following facts:

Findings of Fact.

I.

That on and prior to October 7th, 1872, the plaintiff was the owner of 250 shares of the capital stock of the Eureka Mining Company of Utah, and that on and prior to said date, Joab Lawrence, deceased, was the owner of more than 1,500 shares of said capital stock.

II.

That prior to said date, the plaintiff delivered to said Lawrence certificates of his stock representing 250 shares thereof, and standing in plaintiff's name on the books of said company, and that plaintiff delivered said stock to said Lawrence to be disposed of by him, together with his (said Lawrence's) own stock, for the joint benefit of plaintiff and said Lawrence.

36 III.

That on the date last aforesaid, the said Lawrence sold and disposed of 1,500 shares of his own and said 250 shares of plaintiff's stock, together with 250 shares belonging to one W. H. Wood, to Eber B. Ward; and as a part consideration of said sale, said Lawrence received the real estate described in plaintiff's complaint, taking the deed therefor in his own name individually; that the said Lawrence also received, in consideration of said sale of said stock, a large amount of cash in hand, besides other property. That the sum of $23,587.50 of the amount of cash received by the said Lawrence, as aforesaid, was applied by him in taking up an indebtedness against the Eureka Mining Company; that plaintiff was the owner of one-eighth of the total number of shares of said stock so sold by the said Lawrence to said Ward, the total number of said shares being 2,000, whereof 1,500 shares belonged to said Lawrence, 250 shares to said plaintiff, and 250 shares to said W. H. Wood; that the said real estate and the said $23,587.50 were received by the said Lawrence in trust for said plaintiff to the extent of an undivided one-eighth interest; that the balance of the consideration received by said Lawrence for said sale of said stock

was immediately after said sale distributed between said Lawrence, the plaintiff herein, and said Wood, according to their respective interests therein.

37 IV.

That in recognition of said trust in favor of plaintiff in said real estate and in said $23,587.50, the said Lawrence, on Nov. 9th, 1872, executed and delivered to said plaintiff the declaration of trust set out in plaintiff's complaint. That on, to wit: November 9, 1872, the said Eureka Mining Co. of Utah executed to one Theodore M. Tracy, trustee, a certain mortgage to secure the payment of $43,587.50; the said Tracy taking and holding the said mortgage as trustee for the said Lawrence. That $23,587.50 of said sum of $43,587.50 represented said indebtedness of said Eureka Mining Co. of Utah, which had been taken up by said Lawrence as aforesaid with a portion of the proceeds of said sale of stock. That the remaining $20,000 of said $43,587.50 secured by said mortgage represented an indebtedness due from said Eureka Mining Company of Utah to said Lawrence individually; that said mortgage was not given to secure in whole or in part any indebtedness due from said company to said plaintiff or to said Wood on account of services rendered by them or either of them to said company.

V.

38 That said mortgage was afterwards and prior to the 26th day of August, 1874, assigned by said Tracy to said Lawrence, and the said Lawrence received the same in trust for plaintiff to the extent of said plaintiff's interest therein, as aforesaid, that is to say, to the extent of one-eighth of $23,587.50, and no more.

VI.

That the declaration of trust referred to in the fourth finding herein was in the words and figures following, to wit:

"SALT LAKE CITY, *Nov. 9th*, 1872.

"J. N. Whitney:

"This is to certify that you are entitled to one-eighth interest in the real estate, mining, and rolling-mill stocks, and in the $23,587.50 of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7th, less the farm of 160 acres, which was given to A. A. Griffith. I have received of you 20 shares of Eureka stock, your one-eighth of the 160 shares which was given to Messrs. Griffith & Mayhue.

"JOAB LAWRENCE."

VII.

That the said Joab Lawrence took proceedings to foreclose the said mortgage, and did foreclose the equity of redemption of the

property therein contained. Said property included the
39 mining property of what has been the Eureka Mining Company of Utah. That at the time of the foreclosure a new corporation had been organized under and by virtue of the laws of the Territory of Utah, that had succeeded to the said last-named corporation, and was called the Eureka Hill Mining Company; that said Eureka Hill Mining Company had a capital stock of 10,000 shares. That said decree of foreclosure was entered on the 27th day of July, 1876, and thereafter a deed of the United States marshal for said property was duly executed to the said Joab Lawrence.

VIII.

That the said Joab Lawrence sold and conveyed to the Eureka Hill Mining Company on the 13th day of March, 1877, all his right, title, and interest in and to the said premises, and all that he had acquired under the said mortgage and the foreclosure thereof; and in part consideration thereof he received 30 per cent. of the capital stock of the said Eureka Hill Mining Company, to wit: 3,000 shares.

IX.

That the said Joab Lawrence took said shares of stock in his own individual name on the date aforesaid and held and re-
40 tained the same in his own name until the date of his death, which took place on the 28th day of December, 1888, and claimed and received the dividends thereon, and in all respects held and treated said shares of stock and the dividends received thereon as his own property, and did not at any time recognize any right or interest therein belonging to plaintiff. That the amount of dividends received thereon at the commencement of this action amounted to $94 per share, and at the time of the hearing of this case to $124 per share.

X.

That on the 27th day of September, 1875, the said Joab Lawrence wrote to said W. H. Wood the following letter:

"Wm. H. Wood, Esq.

"DEAR SIR: I am in receipt of yours. Hempstead advises me that the foreclosure suit will come up probably in October term, say about the last of the month. Your interest in the mortgage is one-eighth of $25,000, $3,125. The administrators in the Ward estate have given Mr. Romeyn notice of the intention to amend their complaint, notwithstanding the demurrer to the complaint was sustained and the injunction removed as against me. I have been spending a great deal of money and time in endeavoring to protect the Detroit properly. I now intend going to Salt
41 Lake early in the month. I wish you would at once inform me when you will probably be ready to go West, or will be in Salt Lake.

"Yours etc., JOAB LAWRENCE."

And on the 26th day of December, 1875, said Joab Lawrence also wrote said Wm. H. Wood, as follow-:

"Mr. Romeyn informs me under date of the 16th inst. that the suit of Ward against Lawrence, Whitney and Wood has been discontinued, the receiver discharged and the property placed in my possession. The entire rents have been used up, only $317 to balance, which was paid to Romeyn.

"Yours, &c., LAWRENCE."

XI.

That at no time after December 26th, 1875, did plaintiff claim or demand of said Lawrence any portion of said mortgage property or the proceeds thereof, or any dividends received thereon, until April 6th, 1888, nor did said Lawrence recognize or admit that plaintiff had any interest therein.

XII.

42 On July 18, 1876, William H. Wood wrote to John N. Whitney a letter of which the following is a copy:

"WEST MILLBURY, *July 18th*, 1876.

"FRIEND WHITNEY: Some time since I received a note from you and not having anything new to say, said nothing. I have been knocking around Boston, New York, Phil'd., and having this awful hot weather until I have got sick, and am housed and have a doctor—hope to get through it in a few days—but don't feel worth a cent.

"When in Boston I go to the 'Silver Islet' office and find the reports from the mine good, but no sales of any account. I will keep you posted on it, and if a chance does come will get you out and myself. I met Hill (of the Winnemucca) in Phil'd. How are things in Utah? and does Lawrence and you get along?

"You know you and myself have about $17,000 of our money in the mortgage, beside our portion of the Detroit R. E. and if necessary, have some money left to present my claim in court for a fair and honest adjustment. It seems to me that we should commence and claim our rights very soon, by a suit, if in no other way—all I wish is what is justly due me.

"Very truly yours, WM. H. WOOD."

43 This letter was received by John N. Whitney in due course of mail and was produced by him on the trial of this action in pursuance of a notice.

On March 1st, 1880, William H. Wood wrote to John N. Whitney, a letter of which the following is a copy:

"SAN FRANCISCO, *March 1st*, 1880.

"Mr. John N. Whitney.

"DEAR SIR: Yours came to hand some time since and fully noted. What course is the best to take with Lawrence to bring him to a settlement? Will the law work in this case this late day?

Our claim may be good up on the Eureka in case he should wish to sell as I have his letter saying I was interested one-eighth in the mortgage and in the Detroit property. I think it is time something should be done, and done promptly and fearlessly, and a full exposure made if necessary. I am satisfied the mine cannot be sold if our claim is put in the right shape. I think any one can see it and think we can claim our portion of his receipts in law. Drop me a line at once, as I now intend to start for the East and home in about two weeks, and shall stop at Salt Lake City if it may be best; find out what he intends to do. I mean Lawrence. No other way but to take the bull by the horns, I fear him not. I
44 have closed in one today and he gave down his milk and came to time.

"Yours in haste, WM. H. WOOD."

This letter was received by John N. Whitney in due course of mail, and was produced by him on the trial of this action in pursuance of a notice.

XIII.

That the said plaintiff had actual knowledge of the said conveyance to the Eureka Hill Mining Company at the time same was made, and of the terms on which the same was made; and he also had actual knowledge as early as the month of March, 1880, that the said Lawrence denied and repudiated any alleged interest or claim of said plaintiff in or to any part of said 3,000 shares of stock or in the dividends that had been declared and paid thereon, or in any of the property mentioned in the complaint. That the said Lawrence, in part consideration of the said conveyance to said Eureka Hill Mining Company, under date of March 13th, 1877, received in addition to said 3,000 shares of stock other property, to wit, a quartz mill. That as early as the summer of 1877, the plaintiff had actual knowledge that the said Lawrence had sold and disposed of the machinery of said mill, and was informed of said sale by said
45 Lawrence in person, but he, said plaintiff, did not then, nor has he at any time since, made any demand upon the said Lawrence or his representatives for any part or portion of the proceeds of said sale, nor did he then nor has he at any time since, made any inquiry as to the amount realized by said Lawrence from said sale, although ignorant of the terms thereof.

XIV.

That the said plaintiff knew as early as 1881 that the said Eureka Hill Mining Co. had declared and paid a dividend of one dollar per share upon all of its capital stock, but never at any time prior to the demand hereinafter referred to, did the said plaintiff make any demand upon or request of said Lawrence for any part of the proceeds of said dividends.

XV.

That as early as November, 1885, the said plaintiff had actually knowledge that said Eureka Hill Mining Company had theretofore

declared and paid dividends upon said capital stock aggregating $54.00 per share and that the said Lawrence theretofore received in dividends $54.00 per share on each and all of said 3,000 shares of stock, but the said plaintiff never at any time prior to the de-
46 mand hereinafter referred to made any demand upon or request of said Lawrence for any part or portion of the proceeds of said dividends.

XVI.

That from the month of April, 1877, until the month of —, 1885, the said Lawrence resided in the city of Salt Lake continuously, and during all of said period was absent from said city on rare occasions only, and for brief periods. That he returned to said city of Salt Lake on the — day of October, 1885, and remained in said city continuously thereafter until the 10th day of February, 1886, and returned again on Nov. 1st, 1886, and remained in said city continuously until the 25th day of Jan., 1887. That almost weekly during the years 1877, 1878, 1879, 1888, 1881 and 1882, the said plaintiff met the said Lawrence in said city and conversed with him and also met him in said city frequently in the year 1883 and the year 1884. That in Nov. or Dec., 1885, and after said plaintiff had received actual knowledge of the receipt by said Lawrence of said $54 per share on said 3,000 shares of stock, he, said plaintiff, met and conversed with said Lawrence in Salt Lake City, but made no demand on or request of said Lawrence for any part of said dividends. That during the latter part of the year 1887, the mind and memory of said Lawrence became so impaired by disease, that it was not
47 possible for him to attend to ordinary business matters, and from thence to his death such impairment to his faculties daily increased, so that from the first of the year 1888 until his death he was unable to comprehend any matter of business submitted to him. That said plaintiff never made any demand upon or request of said Lawrence for any portion of said 3,000 shares of stock, or for any portion of the dividends which had been declared or paid thereon as aforesaid, or for any part or portion or interest in said real estate mentioned in said complaint, or the rents, issues or profits thereof, prior to April 6th, 1888, on which date, he did make a formal demand on said Lawrence for an accounting of his alleged interest in the said stock, real estate and rents; but that plaintiff well knew for many months prior to said demand that said Lawrence had been deprived of his reason and mental faculties, as aforesaid.

And as conclusions of law from the foregoing facts, the court now finds and decides:

I.

That said Joab Lawrence was at the time of his death the owner, free from any and all trusts in favor of plaintiff of the property both real and personal, described in plaintiff's complaint.

48 II.

That so far as it is sought by this action to establish a trust in favor of said plaintiff in the real estate mentioned in said complaint, and to obtain any accounting of the rents, issues and profits thereof, said cause of action is barred by the provisions of section 180 of the Code of Civil Procedure of Utah Territory.

III.

That this action in so far as it is sought to establish a trust in favor of plaintiff in any portion of said 3,000 shares of the capital stock of the Eureka Hill Mining Company, and to obtain a judgment decreeing plaintiff to be the equitable owner of 565.216 shares of said 3,000 shares, or to any portions of the dividends declared and paid thereon, is barred by the provisions of section 201 of the Code of Civil Procedure of Utah Territory.

IV.

That the said plaintiff has by his laches and inexcusable neglect and delay, barred and precluded himself of and from any relief in this action.

V.

49 That the plaintiff should have or take nothing by this suit, and the said defendants should have and recover of and from said plaintiff their costs to be taxed, and judgment is hereby ordered to be entered accordingly.

Dated January 12, 1891.

By the court:

T. J. ANDERSON, *Judge.*

Endorsed: Title of court and cause. Findings of fact. Filed January 12th, 1891. Henry G. McMillan, clerk.

(Title of Court and Cause.)

Decree.

This cause came on regularly for trial on the 25th day of June, A. D. 1890, Messrs. Sutherland & Judd and Arthur Brown, Esq., appearing as counsel for the plaintiff, and W. H. Dickson, Esq., and Messrs. Bennett, Marshall & Bradley for the defendants, the case was tried before the court sitting without a jury; and thereupon witnesses were examined on the part of the plaintiff and defendants, and the evidence being closed the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

50 Wherefore, by reason of the law and of the findings aforesaid it is ordered and adjudged that plaintiff take nothing

by reason of his complaint, and that the defendants do have and recover of and from the plaintiff, their costs and disbursements in this action incurred, amounting to the sum of $267.42.

Dated January 12th, A. D. 1891.

By the court:

T. J. ANDERSON, *Judge.*

Attest: HENRY G. McMILLAN, *Clerk.*

Endorsed: Title of court and cause. Decree. Filed January 12th, 1891. Henry G. McMillan, clerk.

The attorneys for the parties being present, Arthur Brown, Esq., attorney for the plaintiff, and Messrs. Bennett, Marshall & Bradley appearing as attorneys for the defense, and the plaintiff's statement on motion for new trial herein is presented for settlement, and the same is settled and signed by the court, and the motion of plaintiff for a new trial herein being also submitted without argument, by counsel, and being considered by the court, and it appearing to the court that the findings and judgment of the court herein are sustained by the evidence and the testimony, and that no error appears sufficient to warrant the setting aside of the judgment herein:

51 It is ordered and adjudged that said motion of the plaintiff for a new trial herein be, and the same is hereby overruled; to which order and ruling of the court plaintiff excepts.

Entered under date of January 8th, 1892.

(Title of Court and Cause.)

Statement on Motion for New Trial.

This cause coming on regularly for hearing before the court on the 25th day of June, 1890, the said plaintiff appearing by Sutherland & Judd and Arthur Brown, his attorneys, and the said defendants appearing by Bennett, Marshall & Bradley and W. H. Dickson, the following proceedings were had and testimony taken so far as applies to the specifications of error:

The first testimony offered in behalf of the plaintiff was the deposition of John N. Whitney, taken in a cause in the supreme court of the city and county of New York, State of New York, wherein the said John N. Whitney and William H. Wood were plaintiffs and the said Joab Lawrence defendant, he being then living, said cause, in which said deposition was taken, being substantially the same cause of action as the case above entitled, and a copy of which complaint and answer are hereto annexed and made a part hereof, marked Exhibit 1.

52 Said deposition of John N. Whitney was objected to by the defendants as not being competent under the statute, but was read and received in evidence subject to the said objection, and was afterwards excluded by the ruling of the court thereafter rendered as follows:

(Title of Court and Cause.)

In the above-entitled cause, at the hearing thereof, evidence was received of the said plaintiff, subject to the objection of the defendants. Before rendering the findings in said cause I decide and determine as a part of the findings "that the evidence of the said plaintiff as to any matter or fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Whitney and said deceased, cannot be received in his own favor in this cause, and is to be excluded."

To which ruling plaintiff by his said counsel excepts.

I also determine that the deposition of the plaintiff, John N. Whitney, who brought an action similar to that of the said Wood, which was heard at the same time, which deposition was taken in New York in a cause in which both this plaintiff and said Wood were plaintiffs against Joab Lawrence, cannot be received,
53 except for the purpose of impeaching the said Whitney, nor any of the evidence of the said Whitney in that said former action, said witness being present in court and orally testifying in this action, to which ruling counsel for plaintiff excepted, but I determine that the evidence of the said Wood given by deposition in this cause wherein this plaintiff, Whitney, is solely the party plaintiff may be received, and I take that into consideration in rendering the findings in this case; to the admission of which evidence the counsel for the defendants excepted.

T. J. ANDERSON, *Judge.*

To which exclusion as therein noted counsel for plaintiff then and there excepted.

JOHN N. WHITNEY, upon the stand in his own behalf, testified as follows:

After proof by the said plaintiff and other witnesses of the identity and genuine character of the books of the Eureka Mining Company the plaintiff read in evidence therefrom the proceedings of the trustees of the said Eureka Mining Company held November 4th, 1874, and the other days as hereinafter mentioned, as follows, to wit:

54 OFFICE OF EUREKA MINING CO., *November 4th*, 1872.

At a meeting of the trustees of the Eureka Mining Company of Utah, held this day at the company's office in this city, there *was* present Joab Lawrence, C. B. Trowbridge, John N. Whitney, Jas. F. Woodman, W. H. Wood.

Absent: George Crismon, Thos. Taylor.

When the treasurer, W. H. Wood, presented the following vouchers for disbursements since May 6th, 1872:

Salary account:

Joab Lawrence	$9,000
J. H. Kiskadden	200
W. H. Wood	5,500
John N. Whitney	5,500
James F. Matthews	1,480

Expense account:

"Law," Joab Lawrence	$4,080 00
Whitney, Richards & H	4,800 00
Joab Lawrence	2,200 00
W. H. Wood	82 20

Upon motion of James F. Woodman, which was concurred in by all present, the vouchers were approved and ordered paid.

On motion of Joab Lawrence, the meeting was adjourned to meet on Saturday, the 9th inst.

W. H. WOOD, *Secretary.*

55 In the District Court for the Third Judicial District of Utah Territory.

JOHN N. WHITNEY, Plaintiff,
vs.
M. C. FOX, Executor of the Estate of Joab Lawrence, *et al.*, Defendants.

Statement on Motion for a New Trial.

This cause coming on regularly for hearing before the court on the 25th day of June, 1890, the said plaintiff appearing by Sutherland & Judd and Arthur Brown, his attorneys, and the said defendants appearing by Bennett, Marshall & Bradley and W. H. Dickson, the following proceedings were had and testimony taken, so far as applies to the specifications of error:

The first testimony offered in behalf of the plaintiff was the deposition of John N. Whitney, taken in a cause in the supreme court of the city and county of New York, State of New York, wherein the said John N. Whitney and William H. Wood were plaintiffs and the said Joab Lawrence defendant, he being then living, said cause in which said deposition was taken being substantially for the same cause of action as the case above entitled, and a copy of which complaint and answer are hereto annexed and made a part hereof, marked Exhibit 1.

Said deposition of John N. Whitney was objected to by the defendants as not being competent under the statute, but was read and received in evidence subject to the said objection, and
56 was afterward excluded by the ruling of the court thereafter rendered as follows:

Title of Court and Cause.

"In the above-entitled cause, at the hearing thereof, evidence was received of the said plaintiff subject to the objection of the defendants. Before rendering the findings in said cause I decided and determine as a part of the findings—

"That the evidence of the said plaintiff as to any matter of fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Whitney and said deceased cannot be received in his own favor in this cause and is to be excluded; to which said ruling the plaintiff, by his counsel, excepts.

"I also determine that the deposition of the plaintiff John N. Whitney, who brought an action similar to that of the said Wood, which was heard at the same time, which deposition was taken in New York in a cause in which both this plaintiff and said Wood were plaintiffs against said Joab Lawrence, cannot be received except for the purpose of impeaching the said Whitney, nor any of the evidence of the said Whitney in that said former action, said Whitney being present in court and orally testifying in this action; to which ruling counsel for plaintiff excepts.

"But I determine that the evidence of said Wood, given by deposition in this cause, wherein this plaintiff Whitney is solely the party plaintiff, may be received, and I take that into consideration in rendering the findings in this case; to the admission of which evidence the counsel for the defendants except.

T. J. ANDERSON, *Judge.*"

57 To which exclusion as therein noted counsel for plaintiff then and there excepted.

That thereafter the said JOHN N. WHITNEY was called as a witness in his own behalf on this trial and was duly examined.

That he testified in his own behalf.

The testimony of said witness on his own behalf was received, but was excluded by order of the court as and to the extent hereinbefore set forth; to which ruling counsel for the plaintiff excepted. His evidence as given on the stand is hereto annexed and made part hereof and marked Whitney's evidence.

That after proving by the said plaintiff and other witnesses the identity and genuine character of the books of the Eureka Mining Co. the plaintiff read in evidence therefrom the proceedings of the trustees of the said Eureka Mining Co. held Nov. 4, 1874, and the other days as hereinafter mentioned, as follows, to wit:

OFFICE OF EUREKA MINING CO., *November 4th*, 1872.

At a meeting of the trustees of the Eureka Mining Company of Utah, held this day at the company's office in this city, there *was* present Joab Lawrence, C. B. Trowbridge, John N. Whitney, Jas. F. Woodman, W. H. Wood.

Absent: George Crismon, Thos. Taylor.

58 When the treasurer, W. H. Wood, presented the following vouchers for disbursements since May 6th, 1872:

Salary account:

Joab Lawrence	$9,000
J. H. Kiskadden	200
W. H. Wood	5,500
John N. Whitney	5,500
James F. Matthews	1,480

Expense account:

"Law," Joab Lawrence	4,080 00
Whitney, Richards & H.	4,800 00
Joab Lawrence	2,200 00
W. H. Wood	82 20

Upon motion of James F. Woodman, which was concurred in by all present, the vouchers were approved and ordered paid.

On motion of Joab Lawrence, the meeting was adjourned to meet on Saturday, the 9th inst.

W. H. WOOD, *Secretary.*

59 OFFICE OF EUREKA MINING CO.,
SATURDAY, *Nov. 9th*, 1872.

At the adjourned meeting of the trustees of the Eureka Mining Company of Utah, held at the company's office on this day, there were present James F. Woodman, Wm. H. Wood, C. B. Trowbridge, John N. Whitney, Joab Lawrence.

Absent: Thos. Taylor, Geo. Crismon.

The president, Joab Lawrence, proceeded to explain the condition of affairs.

Whereas, this company is now indebted to Joab Lawrence in 150 shares of the capital stock of the company, loaned by him to it for the purpose of compromising the suit of Harstow and others; and,

Whereas, this company is the owner of 48 shares of stock therein, now standing on the books of the company in the name of Whitney, Richards & Hastings; now, therefore,

It is *is* resolved, 1st. That said 48 shares be transferred to the said Joab Lawrence as part payment of said 150 shares due and owing him, and that the secretary is hereby instructed to see that such transfer is duly made.

2d. That the company pay to the said Lawrence the sum of $4,080, being at the rate of $40 per share, in full discharge of said 150 shares so due and owing him, the said Joab Lawrence.

It was resolved, that the president, Joab Lawrence, shall be,
60 and is hereby fully authorized for and in the name of this company to compromise, contract and settle with the Jenny Lind Company, claimants of the Queen Victoria lode, the Pride of the West lode, and the south extention of the Bullion lode, situate on Eureka hill, Tintic mining district, Juab county, Utah Territory, provided that the said Lawrence shall not in any way grant or concede any part or parcel of the Eureka lode, or other properties of the said company, but shall only secure to said Jenny Lind Com-

pany the enjoyment of the legal rights to said three lodes. And the said Lawrence is hereby authorized in the name of this company to sign, execute and deliver the necessary agreement papers and deeds for the purpose aforesaid, and the secretary of this company is hereby directed to attach thereto the seal of the corporation and attest the same.

And it is resolved, that Joab Lawrence, the president of this company, is hereby authorized to contract and compromise on the best terms possible, or which may to him seem best, with Peter Roberts and others, claimants of the York lode, on Eureka hill, Tintic mining district, Utah Territory, and to sign, execute and deliver for and on behalf of the company, and in its name, any and all necessary agreements, papers or deeds necessary herein for the purpose of assuring to said owners of the York lode their legal and
61 equitable rights thereto. Provided the said Lawrence shall in nowise grant or convey or concede to said owners of the York lode any part or parcel of the Eureka lode or other properties of this company, and the secretary is hereby directed to attach to said agreement, contract or deed of this company the corporate seal thereof, and to attest the same.

Whereas this corporation was, on August 22nd, A. D. 1872, indebted to Joab Lawrence for money advanced up to that date in the sum of $23,587.50, and on November 7th, A. D. 1872, in the further sum of $20,000, by him at that date loaned and advanced to this company, which sum, aggregating the sum of $43,587.50, is justly due and owing him, the said Lawrence. Now, for the purpose of securing the same and equalizing the just interest thereon,

It is resolved, that the president is hereby authorized and directed to make, execute and deliver to Theodore F. Tracy, trustee, the negotiable promissory note in the name and on behalf of the company of said sum of $43,587.50, the said note drawn payable to the order of said Theodore F. Tracy, trustee, to be dated September 15th, 1872, and to bear interest at the rate of 20 per cent. per annum, payable in six months after the date thereof, and for the securing the payment thereof, to make, execute, sign, seal and deliver on good and sufficient mortgage on the mining property and real estate,
62 quartz mill and machinery of this company, situate, lying and being in Tintic mining district, Juab county, Utah Territory; and the said Joab Lawrence is hereby authorized to sign the same in the name and on behalf of this company, for the purpose aforesaid; and the secretary of this corporation is hereby directed to attach thereto the seal of said corporation, and to attest the same, the said note and mortgage aforesaid being given, made and executed in discharge and payment of said debt to the said Joab Lawrence.

It is resolved, that Joab Lawrence, the president of this company, is hereby authorized to contract and compromise on the best terms possible, or which to him may seem best, with John Beck and others, claimants of the north extension of the Bullion lode, on Eureka hill, Tintic mining district, Juab county, Utah Territory, and to sign, execute and deliver for and on behalf of the company,

and in its name and all necessary agreements, papers or deeds necessary herein for the purpose of assuring to said owners of the north extension of the Bullion lode, their legal and equitable rights thereto, provided the said Lawrence shall in nowise grant, convey or concede to said owners of the north extension of the Bullion lode any part or parcel of the Eureka lode, or the other properties of this company; and the secretary is hereby directed to attach to
63 said agreement, contract or deed of this company the corporate seal thereof, and to attest the same.

W. H. WOOD, *Secretary.*

The plaintiff also proved that the book marked "I" was the ledger book of accounts of the said Eureka Mining Company of Utah, and the same was duly admitted by the said court as the ledger book of accounts of the said company, portions of which were read in evidence, as follows:

SALT LAKE CITY, *October*, 1872.

October 3d.

55. Salary account, No. 287:

Joab Lawrence	$9,000
John N. Whitney	5,500
W. H. Wood	5,500
J. H. Kiskadden	200

35. Expense account, No. 287:

Whitney, Richards and H	$4,800
Joab Lawrence	4,080
Joab Lawrence	2,200

28. To Wells, Fargo & Co.— $31,280

August 22d.

27. Wells, Fargo & Co.—

To Joab Lawrence $23,587 50

Loaned to company.

64 November 7th.

28. Wells, Fargo & Co., $20,000.00—

To Joab Lawrence $20,000
64. Dp.

November 7th.

28. Wells, Fargo & Co.,4,800—

To Whitney, R. and Hastings $4,800
19. Dp.

February 20th.

64. Joab Lawrence	$43,587 50
64. To bills payable	43,587 50

To the negotiable promissory note of this company, dated, September 15th, 1872, at six months after date, payable to T. F. Tracey, trustee, with 20 per cent. interest per annum, secured by mortgage on the property of this company. See authority of the board, November 9th, Book of Records of Meetings, page 45.

The said witness also proved that the book marked Exhibit "A. J." to his testimony was one of the books of account of said Eureka Mining Company, and that the same was the day book or journal, and from said book he read in evidence as follows:

Dr.	Joab Lawrence.	Cr.
1873.		
Feb. 20, to bills payable (76).	$43,587 50	
1872.		
Aug. 22, by W. F. & Co.		$23,587 50
Nov. 7, by W. F. & Co.		20,000 00

65 And also as follows:

Dr.	*Salary Account.*		Cr.
1871.			
Aug. 7, to check No. 45 (14).	$450 00		
Oct. 9, to check No. 77.	1,116 13		
Nov. 7, to check No. 91.	500 00		
Nov. 8, to check No. 92.	166 67	Dec. 31, by bal.	$2,132 80
	$2,132 80		$2,132 80
1872.			
Jan. 1, to balance.	$2,132 80		
Jan. 1, to check No. 185.	150 00		
April 30, to check No. 233.	200 00		
Aug. 27, to check No. 257.	1,480 00		
Oct. 3, to check No. 286.	2,200 00		
Jan. 13, to check No. 342.	1,600 00		
Feb. 20, to check No. 369.	600 00		

And also as follows:

Dr.	Whitney, Richards & Hastings.		Cr.
1871.			
July 13, to check No. 11(8)	$4,800 00	Dec. 21, by bal.	$4,800 00
1872.			
Jan. 1, to bal.	$4,800 00	Nov. 7, by W. F. & Co.	4,800 00

And also as follows:

Dr.	John N. Whitney.		Cr.
1872.			
May 29, to check No. 242.	$2,000 00	Sept. 12, by check No. 264.....	$733 12
June 24, to check No. 246.	2,000 00	Sept. 18, by check.	8,051 27
July 26, to check No. 249.	2,500 00	Sept. 28, by check..	485 75
Aug. 1, to check No. 250..	300 00	Nov. 7, by check...	880 00
Aug. 29, to check No. 259.	2,000 00	Nov. 7, by check...	12 98
Sept. 12, to check No. 263.	433 12		
Sept. 13, to check No. 265.	50 00		
Sept. 20, to check No. 266.	880 00		
	$10,163 12		$10,163 12

And said books, so introduced by the witness as the account books of the said company, do not show anywhere that the salary account, that was voted to Whitney and Wood, of $5,500 each, was ever paid.

66 While the said Whitney was also a witness upon the stand, a stub book was produced, by notice served upon counsel for the defendants, and produced by said counsel for the defendants, and after being so produced was admitted to have been in the office and among the files of the said Eureka Mining Company of Utah, and also proven to be such by other witnesses.

In said stub book was found the check No. 287 and the stub connected therewith.

Said stub and check are as follows, to wit:

The Eureka Mining Company of Utah.

$31,280. Office of the Eureka Mining Company of Utah.

Salt Lake City, *Oct.* 3*d*, 1872.

Wells, Fargo & Company:

Pay to salary expense and expense Law, or bearer, thirty-one thousand two hundred eighty dollars.

W. H. WOOD, *Sec'y and Treas.*
JOAB LAWRENCE, *Pres't.*
THE EUREKA MINING COMPANY OF UTAH.

No. 287.

(Stamp, marked paid "Wells, Fargo & Co. banking dep't." Salt Lake City, Nov. 7, 1872.)

67 $31,280. October 3d, 1872.

Account of Salary.

Joab Lawrence.....	$9,000
J. N. Whitney.....	5,500
W. H. Wood.....	5,500
J. H. Kiskadden.....	200
	$20,200

Expense.

Whitney, Richards & H.....	$4,800	
Joab Lawrence	4,080	
Joab Lawrence	2,200	
		11,080
		$31,280

No. 287.

A number of witnesses were called by the said plaintiff to prove, and each of them testified that the part in writing of the said check and the stub accompanying the same were in the handwriting of the said Joab Lawrence, to wit: that the words "Salary, Joab Lawrence, J. N. Whitney, W. H. Wood, J. H. Kiskadden, expense, Whitney, Richards & H., Joab Lawrence," and the figures opposite said names were in the handwriting of the said Lawrence, and that the words in said check "Salary, expense, and expense Law," and the figures "31,280," were in the handwriting of Joab Lawrence, and the signature in W. H. Wood's handwriting.

68 Plaintiff also read as evidence in support of his said claim the deposition of WILLIAM H. WOOD:

Q. State whether or not you became interested in said property; and, if so, state thee time when — the circumstances in detail under which you became interested.

A. I will now endeavor to relate the history and circumstances by which I eventually became interested therein. In April, 1871, being then in San Francisco, I received a letter from John N. Whitney, dated Salt Lake City, asking me to come to this place, saying that he had some mining property which he would like to show me, said to be very valuable. In May following I left San Francisco for the East and arrived at Salt Lake City May 13, 1871, stopping at the Townsend house. I then learned that Mr. Whitney had gone to Chicago, but was expected to return in a few days. I there met Mr. Tranor W. Park, who advised me to remain until Mr. Whitney returned from Chicago, as, from all he had heard about the Eureka, he believed it to be a very valuable property. I did remain until Mr. Whitney's return, that being on or about the 19th of May, 1871, and with Mr. Whitney arrived Joab Lawrence and J. B. Richards, when I was introduced to them by Whitney.

The following day Mr. Whitney, Mr. Lawrence, Mr. Richards, and myself started for Eureka for the purpose of looking at this mining property. Mr. Lawrence asked me what I thought of it. I replied it looked well. He then asked me if I was a relative or in any way connected with Whitney. I replied that I was not in any way. The morning of May 23, 1871, we started back, arriving at Salt Lake the evening of the 24th of May. Mr. Lawrence had,
69 during our journey at the mine, asked me if I should be willing to risk my money in this enterprise. I replied that I would, for a reasonable amount, if I had ready money.

Mr. Whitney had shown me a bond he and Richards held on these various mining claims, which expired May 25th, 1871, which required them to raise $100,000 as working capital, to be placed to the credit of the corporation then to be organized, with a capital of $500,000, and for procuring this $100,000 to be thus credited Whitney and Richards were to receive an equal one-half interest in the property specified in the bond from each signer thereof, excepting Mr. Whitney, who retained his entire mining interest, valued in the bond at $30,000. I understood Mr. Whitney had proposed to Joab Lawrence that if he put up the $100,000 required by the conditions of the bond that he should have two-fifths of the stock of the company when organized. On the morning of the 25th of May, 1871, at the Townsend house I heard Lawrence state to Whitney that he would like to take that two-fifths interest in the property; that he had brought only $50,000 with him from Chicago, but that he had a plan that might work. Lawrence said:

Whitney, you go over to Hussey's bank. Tell him we are going to incorporate a mining company today and want to deposit with him $50,000 cash and $50,000 in demand notes, and ask him if he will issue his certificate of deposit for $100,000, and place the same to the credit of the mining company when organized, both notes and cash to be credited as cash on the books; that this credit was for the working capital of the company.

Mr. Whitney returned to the Townsend house and reported to Mr. Lawrence, I being present, that Hussey said he would
70 issue the certificate and credit as proposed. Mr. Lawrence then made up a card for the officers of the company, naming himself for president, John N. Whitney vice-president, and asked me if I would subscribe for 250 shares of his stock and take the office of secretary and treasurer. I replied that I had not come to Salt Lake intending to remain any length of time, but if I could be of any assistance for the time being he could use my name for that purpose.

He then proposed making our three notes in the aggregate amounting to $50,000, these notes being made at the suggestion and for the express accommodation of Mr. Lawrence, Mr. Lawrence saying to us that he would pay these notes by placing $50,000 in cash there and take them out of the bank, which three notes—two for $15,000 each and one for $20,000—were for the consideration of one-half of the two-fifths of the capital stock; in other words, $50.00 per share was paid in for the stock. Lawrence told Whitney he would take and put up $100,000 working capital, for with this understanding we consented and did sign these notes with him for his temporary accommodation. Lawrence, Whitney, and myself then went to the First National Bank of Utah, where these notes were drawn, each signing one, being endorsed by the other two. There Mr. Hussey was handed these notes with $50,000 money, when he issued his bank certificate for $100,000. With this certificate of deposit issued for $100,000 we then went to Marshall & Carter's office, in Salt Lake City, and Whitney, with the aid of this certificate, satisfied a majority of the owners of the mining property and

signers of his bond that the $100,000 working capital was
71 obtained, when the necessary papers incorporating the Eureka Mining Company of Utah were made out and completed that day, May 25, 1871.

Q. State, if you know, how much said parties—Joab Lawrence, John N. Whitney, and yourself—respectively contributed at the time of the incorporation of said mining company or when the stock of the company was issued and by what means the money for each contribution was raised.

A. Joab Lawrence contributed $50,000 in money and $50,000 in demand notes, referred to in my answer to the eighth direct interrogatory, which were deposited with the same amount in cash to the credit of the Eureka Mining Company of Utah with the First National Bank of Salt Lake.

John N. Whitney contributed mining property valued at $30,500, with his property and proceeds arising out of his proportion of the property under the bond. I think he received upwards of 550 shares of the capital stock at the time original shares were issued. I contributed nothing to the company save by signing the note for the accommodation of Lawrence, as I have already stated.

Q. If you state that any part of the consideration was raised by notes made and endorsed by the three parties last mentioned, state whether or not you were present at the time they were made and endorsed; and, if so, state by whom those notes were made and endorsed.

A. I was present at the making and endorsing of these demand notes, it being in the First National Bank of Utah, in Salt Lake City, May 25, 1871, their aggregate being $50,000. They
72 were made and endorsed by Joab Lawrence, J. N. Whitney, and myself. Each signed one note as principal and the other two endorsed it. Lawrence's note and mine were for $15,000 each and Whitney's *for* was for $20,000.

Q. If you state that you raised money for your subscription by means of a note made or endorsed by any of the parties to this action, state whether or not you ever took up said note and paid cash for your subscription.

A. I never raised money for my subscription or for any other purpose by means of any note or endorsement by any of the parties to this action, but did subscribe to 250 *sahres* of the capital stock of this mining company at time of incorporation, at the wish of Joab Lawrence, for his account. Lawrence some time afterwards told me that if I wanted those shares I might keep them by paying to him $50 per share, and I decided to take this 250 shares, which I originally subscribed for to Lawrence, to my own account in July, 1871. I then so notified Mr. Lawrence, who said that when he needed the money he would call on me to pay, and on December 5, 1871, Lawrence said to me that he needed the money for these 250 shares of stock, when, on December 6th, I made my draft on William H. Dunbar for $12,500 *dollars* in favor of Mr. T. F. Tracy, at the request of Mr. Lawrence, who wrote the draft, the memorandum account of which I kept at the time, which memorandum ac-

count I now offer to be annexed to my deposition, marked "Schedule C." I never took up the note I signed at the First National Bank of Utah, May 21, 1871, these notes being for Lawrence's convenience and obligation, with no consideration upon the part of any one outside of himself.

73 Q. If you state that in October, 1872, he returned a second time from Detroit, state whether or not, after such return from Detroit, the said Lawrence had any conversation with you touching any further disposition of the pooled stock of the Eureka Mining Co. of Utah; and, if so, state what that consideration was, about when and where it occurred, and who were present at the conversation.

A. On the evening of his return from Detroit, Oct. 18, 1872, in the office of the company in Salt Lake City, in the presence of Mr. Whitney and myself, Mr. Lawrence stated that he had made a trade with Ward Oct. 7th, delivered to him 2,000 shares of stock of the Eureka Mining Co. of Utah, Oct. 9th, and what he received from E. B. Ward for such stock; also that he had given Griffith and Mayhew 160 shares of the Eureka stock for their services in assisting in the trade, and had given Griffith the 160-acre farm in the country received from Ward for helping in the trade, saying to Whitney and myself that he did not know whether he had made a good trade or a bad one. Lawrence also stated, "I will now tell you what I wanted when I wired you to pass a blank check in the company's check book. When I made the trade with Ward he asked me if there was any indebtedness against the company;" said he told him there was; what amount he was unable to state, but he would guarantee it should not exceed $50,000. He wanted that blank check left so that he could use it to pay some claims against the company; that he wanted to date the check back, showing these claims to have been paid before he made the trade with Ward Oct. 7th; that we must have the trustees allow us for services. Referring to the trade with Ward, he said that we

74 could have as much, as little, all or none of it, as we saw fit, saying that he had delivered to Ward from the shares he had 250 standing in my name and 250 standing in the name of Mr. Whitney. Mr. Whitney then remarked that, let the trade be good or bad, he thought that one-eighth of the shares delivered to Ward being in his name, that he ought to take about that interest in the property Lawrence had obtained from Ward. That being my views, I then said I would take the same interest.

Lawrence said he received from Ward 12 shares of Silver Islet mining stock, 1,300 shares of Wyandotte Rolling Mill stock, 160 acres of land in the county, and the Mansion House property, consisting of three lots on the corner of Griswell and another street in Detroit. He said there was a sailors' home or hotel, warehouse, and coal sheds on the lots—valuation, thirty-five thousand dollars—and that this Mansion House property stood in his name. He said he had also received thirty thousand dollars in E. B. Ward's notes, payable in one year, which he had discounted at Ward's bank, receiving twenty-seven thousand dollars out of them, and out of that

he had paid one of the notes at the Ypsilanti bank of ten thousand dollars, and the 160 acres he had given to Griffith for his services in making this trade, all of which transactions Whitney and I assented to; that as to the money received from the Ward notes, he had applied ten thousand dollars to pay one of the notes given at the Ypsilanti bank, and that $15,000 still remained unpaid at the bank, leaving two thousand in his hands, which he would divide proportionately to the interest we had decided to take in the
75 Ward transaction, to wit, two hundred and fifty dollars each to myself and Whitney and $1,500 to himself.

Q. State whether or not, at the time of said Lawrence's second return from Detroit or prior thereto, the Eureka Mining Co. of Utah paid, either to yourself, Lawrence, or John N. Whitney, any salary as officers of said company.

A. It had not paid any of the parties to this action any salary for services rendered.

Q. If you state that the company had not paid such salary, state what amount of such salary was unpaid at this time and for what period of services.

A. There was due me for services as secretary and treasurer of the company from May 25, 1871, to Nov. 4, 1872, or thereabouts, $5,500. The same amount was due Whitney for services as vice-president and services during the same period. $9,000 was due to Lawrence for services as president. These amounts were fixed upon at a trustees' meeting held Nov. 4, 1872.

Q. State whether or not you had any conversation prior to Nov. 4, 1872, with said Joab Lawrence on the subject of this indebtedness for any salary of the company to the officers of said company.

A. I had such conversation.

Q. If you state that you had such conversation, state if there was more than one; and, if so, state when and where those conversations occurred, who were present, and what was said.

A. We talked frequently about our services, more especially a short time before the holding of the meeting of the trustees of No-. 4, 1872, when Lawrence said, "We will have the trustees au-
76 thorize the payment for our services at that meeting." This conversation occurred in the office of the company, in Salt Lake City, prior to Nov. 4th, 1872, Lawrence and myself being present. One other like conversation occurred during the forenoon of Nov. 4th, 1872, before holding of the trustees' meeting in the company's office, in Salt Lake, at which time he wrote out our bills, to be presented at the trustees' meeting to be held that day, for services rendered to that day, Lawrence, Whitney, and myself being present at this meeting. Our bills were for the respective amounts stated in my answer to the 36th interrogatory.

Q. State whether or not there was a meeting of the trustees of the Eureka Mining Co. of Utah in Nov., 1872, and whether or not you were present; and, if so, state when such meeting occurred, who were present, and what was said and done thereat.

A. There was a trustees' meeting held Nov. 4, 1872; I was present at the meeting; Joab Lawrence, J. N. Whitney, C. B. Trow-

bridge, and J. F. Woodman were also present, when bills which had accrued since May 6th, 1872, were presented and explained by Lawrence, stating that the company was indebted in the sum of $20,700 for services, $9,000 to himself, $5,500 to Whitney, $5,500 to myself, and $200 to Kiskadden. The company was further indebted $2,200 for Lawrence's expenses while in Europe on business of the company. $4,080 and $4,800, inclusive, with forty-eight shares of stock said to belong to the company, was for settlement for 150 shares of Eureka stock he had given Barstow to compromise some claim against the company; thirty-one dollars and thirty-four and sixty-five one-hundredths dollars was for some bills paid by himself; two hundred and eighty-three and seventy-five hun-
77 dredths dollars was for a voucher for incidental expenses and payments made for the company by Whitney, and eight hundred dollars was for another voucher made by Lawrence for expenditures. Upon motion of Woodman, which was concurred in, these bills were allowed, approved, and ordered paid. On motion of Lawrence, the meeting adjourned to meet the 9th inst.

Q. If you state that the indebtedness of the Eureka Mining Co. of Utah to the said officers, John N. Whitney, Joab Lawrence, and yourself, for salary account was ordered to be paid at that meeting, state whether you had any subsequent conversation with said Joab Lawrence on the subject of such payment.

A. I did have subsequent conversation with defendant on the subject of such payment.

Q. If you stated you had such conversation, state when and where it occurred, who were present, what was said thereat, and what was done.

A. One occurred in the office of the company in the forenoon of Nov. 7th, 1872; Lawrence, myself, and Whitney were present, when he said, "I am going to draw the check for our salaries today and use the blank which I wired you from Detroit to have passed." Another conversation occurred in the office of the company, in Salt Lake City, during the afternoon of Nov. 7th, 1872; Lawrence, myself, and Whitney were present, when Lawrence, sitting at his desk, having the company's check book before him, wrote out one or more checks; then, rising from his desk and holding out his hand, with a check displayed, remarked that there is the check for our sal-ries, and then left the office, saying he was going to the bank.

78 Q. If you state that said Joab Lawrence drew a check for the salary of the three persons mentioned—yourself, John N. Whitney, and himself—at that conversation, state whether you saw him draw such check and to whose order it was drawn.

A. I saw him draw the check, which he said was for our salaries, and take it with him from the office, going in the direction of the bank; did not examine the check, therefore cannot say to whose order it was drawn or its amount; but the implications from all the circumstances were that it was drawn in such manner that he could collect it at the bank.

Q. If you state it was drawn to the order of Joab Lawrence, state whether or not he took the check into his possession.

A. I have stated I cannot positively swear that it was drawn to the order of defendant, but he did take the check into his own possession.

Q. If in answer to the last interrogatory you state that said Joab Lawrence took such check into his own possession, then state whether or not he said anything about the disposition of the same.

A. Holding it in his hand, he said, "There is the check for our salaries," or words to that effect, and took it with him out of the office.

Q. If the said Joab Lawrence said anything at that time about the disposition of said check, state what he said.

A. He said, "There is the check for our salaries; I am going to the bank with it."

Q. State whether or not said Joab Lawrence subsequently spoke of the disposition of said check; and, if so, state the substance
79 of such conversation.

A. Upon this return he said he had been to the bank, sat down at his desk in the company's office, and proposed to us to loan the $20,000 for salaries to the company and consolidate it with the 23,587.50 in a mortgage, and carry this in a mortgage against the company, as the company was requiring money to continue its busines-. We assented to the proposition. I must explain that this $23,587.50 was the proceeds after deducting discount of the $25,000 loan which Lawrence had obtained for the company from the Ypsilanti bank, and which I have heretofore referred to.

Q. If you state in answer to the last interrogatory that the defendant said he proposed to loan the $20,000 for salaries to the company and consolidate that with the $23,587.50 in a mortgage, state whether or not you had any other conversations with him about such proposed action.

A. I cannot remember having any particular conversation with him about such proposed action. However, Whitney and myself both assented to it.

Q. If you say you saw the check, state, if you recollect, the amount of said check.

A. The check was not handed to me to examine; therefore cannot state the amount.

Q. If you state that you saw the check, state, if you recollect, what the date of said check was, and whether or not it was dated upon the day it was drawn.

A. The check was not examined by me. I never saw the check afterwards and cannot state its date.

Q. State, if you know, what the date was when this con-
80 versation took place and the said check drawn.

A. The said check was drawn Nov. 7, 1872.

Q. State whether or not after this conversation there was another and adjourned meeting of the trustees of the Eureka Mining Co. of Utah.

A. There was another adjourned meeting of the trustees of the Eureka Mining Co. of Utah.

Q. If you state that there was such a meeting, state whether you were present at the whole of such meeting.

A. I was present at the whole of such adjourned meeting.

Q. If, in answer to the last interrogatory, you state that you were present, state what was done at said meeting.

A. At said meeting a resolution was passed by the board of trustees of the company by which the president and secretary were authorized and directed to make, execute, and deliver to Theodore F. Tracy, trustee, a negotiable promissory note in the name of and on behalf of the company for $43,587.50, said note to be dated Sept. 15th, 1872, and to bear interest at 20 per cent. per annum, payable six months from date, and to make, execute, sign, seal, and deliver a good and sufficient mortgage on all the property of the company to secure the payment thereof.

Q. If you state that a mortgage to Theodore F. Tracy was authorized at said meeting for $43,587.50, state for whose benefit that mortgage was made, and what, if you know, subsequently became of it.

A. I understood this mortgage when authorized was to be for the mutual benefit of the parties to this suit, in proportion to
81 the amount that each had contributed to the a-vances made the company. Although the indebtedness was represented in the resolution then passed as being a debt owing to Joab Lawrence for money advanced up to that date, the fact was that one-eighth of $23,587.50 and $5,500 due myself (the aggregate being $8,348.44, which I contributed), and an equal sum contributed by Whitney, were added to what Lawrence actually contributed to make up the entire contribution of $43,587.50, the sum named in the mortgage. The note and mortgage subsequently executed was taken by Lawrence into his possession.

82 Q. State, if you know, whether said mortgage was ever foreclosed.

A. Lawrence frequently told me the foreclosure suit was pending, but I had no other knowledge of it at that time. I have since learned that the mortgage was foreclosed.

Q. If you state that the mortgage was foreclosed, state whether or not you had any conversation with said Joab Lawrence and with John N. Whitney during the foreclosure of said mortgage.

A. I did have such conversation with Whitney and the defendant.

Q. If you state that you did have such conversation, state when and where that conversation occurred, who was present, and what was said.

A. On or about the 16th day of Nov., 1875, in room 50 of the Townsend house, in Salt Lake City, Utah, Whitney being present, we had quite a lengthy talk about the mortgage, during which Lawrence said, "What we want is some kind of a compromise with these fellows holding the Wells-Fargo claim," saying he thought we had better take 20 per cent. of the shares in their incorporation, if

we could not do any better, rather than continue the fight under the mortgage. Whitney spoke at once, saying the mortgage ought to take the whole property. Lawrence replied, saying, "Mr. Whitney, you don't want to be too hasty in this matter." Mr. Whitney replied, saying, "Well, Mr. Lawrence, you are the man running this thing; go ahead; do what you think best." Whitney soo- left. Shortly after he returned, saying he saw Bennett, whom he had asked what interest his folks were willing to give in their
83 company for a settlement of the Lawrence mortgage, saying Bennett freely talked thirty per cent., and said that he had told Bennett he did not think it could be compromised for 50 per cent.

Q. State, if you know, what was the result of the foreclosure of the mortgage to which you have referred.

A. The property was sold to satisfy the mortgage, and there were delivered to Lawrence three thousand shares of the Eureka Hill Mining Co. of Utah stock according to the compromise agreement which he had made.

Q. If you state that if finally resulted in the delivery to said Joab Lawrence of 3,000 shares of the stock of the Eureka Hill Mining Co., state whether or not you ever received any portion of said shares.

A. I have not.

Q. State whether or not you have ever had any further conversation with said Joab Lawrence regarding your and Whitney's interest in said shares of stock or the Mansion House property or in regard to the successive considerations which they represent.

A. I have.

Q. If you state that you have had such conversations, state when and where they occurred, who were present, and what was said about the interest of either Whitney or yourself.

A. From Dec., 1875, to Nov. 22, 1879, I have been in Salt Lake at least three times and on two occasions, at least, saw Lawrence there. He talked of our interest every time I saw him. He always said that the Detroit property remained just the same as conveyed by Captain Ward; that the receipts about paid the expenditures. The mine he said had not been paying; sometimes a little ahead and sometimes away behind; saw him the first time in Dec.,
84 1875, I think. The second conversation referred to took place in the Walker house, in Salt Lake City, on Nov. 20, 1879. As I have said, at all of these conversations we talked about the Detroit property and the mine and the three thousand shares of the Eureka Hill Mining Company's stock. The tenor of his conversation was always in effect that I have above stated. I am certain that we talked of these matters, always to the same effect, as I have stated. I think the last time was in Salt Lake in 1883, but I have no date which enables me to swear positively to this.

Q. State whether or not you have been paid the sum of $5,500 which you have stated was due you from the Eureka Mining Co. of Utah on account of salary.

A. I have not.

Q. State whether or not you ever received from the said Joab Lawrence the one-eighth interest in the property which he admitted he held for you in trust under and by the instrument corresponding to "Schedule A" hereto annexed.

A. I have not.

Q. State whether or not the defendant told you that the 3,000 shares of stock in the Eureka Hill Mining Co. you have referred to were producing dividends.

A. He did not at any time. On the contrary, he led me to believe that the stock was of little or no value.

Q. State whether or not you have received any dividends on the 3,000 shares of stock in the Eureka Hill Mining Co. of Utah you have above referred to.

A. I have not received any dividends of the said 3,000 shares of stock in the Eureka Hill Mining Co. of Utah or from any part of it.

85 Q. State whether or not you received any of the rents and profits from the Mansion House property.

A. I have not received one cent of the rents and profits of the Mansion House property.

Q. State whether or not you gave John N. Whitney authority to make a demand upon said Joab Lawrence for an accounting of his trust and authority to bring this suit.

A. I did give Whitney such authority.

Q. State whether or not you ever made any entries in the ledger or journal of the Eureka Mining Co. of Utah during the period when you were in the office of said company.

A. If I ever did make such entry they were made under the direction of the defendant, because he superintended the keeping of all the books himself and I had nothing to do with it.

Q. State whether or not you wrote the minutes of the meetings of the board of trustees of the Eureka Mining Co. of Utah.

A. I do not think I ever wrote the minutes of any meeting of the board of trustees of the Eureka Mining Co.

Q. If you state you did write such minutes, state by whom such minutes were worded and under whose directions they were written.

A. Said minutes were formed, worded, and directed by the defendant.

Q. State whether or not you ever had any settlement with Joab Lawrence of the matters in controversy here and growing out of the transactions which you have heretofore described.

A. I never had any such settlement with the defendant.

Q. State whether or not since the time said Joab Lawrence obtained possession of the 3,000 shares of the stock of the Eureka

86 Mining Co. of Utah and the Mansion House property in Detroit; said Joab Lawrence has claimed that he held the stock and real property otherwise than jointly for himself and for the benefit of yourself and John N. Whitney.

A. He never has made any such claim.

In cross-examination the said witness, William H. Wood, testified as follows relative to matters to be considered under said exceptions:

I have stated in answer to direct interrogatory I signed a note for $15,000 to accommodate Lawrence, and, although I appear as one of the original subscribers to the stock, that subscription was really made for the benefit of Lawrence, and I had no interest in the stock whatsoever until some time in July, 1871. I then told Lawrence that I would take the stock, and he agreed that I should have the 250 shares at $50 per share. Then, when, on the 6th day of December, I paid to Lawrence $12,500, referred to in my direct examination, I asked him about that note which I had given for his accommodation. He said it was in the bank and that he would get it. The next day he brought to me the note, and I then cancelled my signature on it and handed it to Lawrence. I have not seen it since and do not know what has become of it.

My duties as secretary were to keep the minutes of the meetings of the stockholders and trustees and the record of the transfer of stock. Among other things, it was my duty to keep the minutes of the meetings of the board of trustees and of the company.

87 Lawrence usually wrote the minutes in the minute book, and I appended my signature as secretary. Such records, when signed by me, were correct to the best of my knowledge; I thought they were correct when I signed them.

Lawrence brought it (the note) to me December 7, 1871, when I cancelled my signature and returned it to him, it being his property and obligation.

I never borrowed money of the defendant in any amount.

I bought 250 shares of the Eureka Mining Co. of Utah stock, issued in my name just after the incorporation. This purchase was in July, 1871. I agreed to pay Lawrence $50 per share and paid defendant $12,500 for the same Dec. 6, 1871.

I dictated no minutes of any meeting of the board of trustees and do not think I wrote or kept any minutes of other meetings. I was secretary at that time, and any minutes that may have been written or signed by me were correct to the best of my knowledge. Not having examined the check drawn by Lawrence at that time nor having seen the check returned from the bank, I am unable to state its amount.

I kept the books of the Eureka Mining Co. in the manner that I have before indicated. I did not write the minutes of the meetings of the board of trustees of the Eureka Mining Co. Such records, when signed by me, were correct to the best of my knowledge; I thought they were when I signed them.

I have not personally made a demand upon defendant for an accounting, the reason being that Lawrence invariably told me that there were no profits arising from the Eureka Hill stock or from the property in Detroit.

88 My knowledge of the delivery of 3,000 shares of the Eureka Hill Mining Company's stock to the defendant as the result of a compromise and foreclosure of the mortgage was re-

Q. State whether or not you ever received from the said Joab Lawrence the one-eighth interest in the property which he admitted he held for you in trust under and by the instrument corresponding to "Schedule A" hereto annexed.

A. I have not.

Q. State whether or not the defendant told you that the 3,000 shares of stock in the Eureka Hill Mining Co. you have referred to were producing dividends.

A. He did not at any time. On the contrary, he led me to believe that the stock was of little or no value.

Q. State whether or not you have received any dividends on the 3,000 shares of stock in the Eureka Hill Mining Co. of Utah you have above referred to.

A. I have not received any dividends of the said 3,000 shares of stock in the Eureka Hill Mining Co. of Utah or from any part of it.

85 Q. State whether or not you received any of the rents and profits from the Mansion House property.

A. I have not received one cent of the rents and profits of the Mansion House property.

Q. State whether or not you gave John N. Whitney authority to make a demand upon said Joab Lawrence for an accounting of his trust and authority to bring this suit.

A. I did give Whitney such authority.

Q. State whether or not you ever made any entries in the ledger or journal of the Eureka Mining Co. of Utah during the period when you were in the office of said company.

A. If I ever did make such entry they were made under the direction of the defendant, because he superintended the keeping of all the books himself and I had nothing to do with it.

Q. State whether or not you wrote the minutes of the meetings of the board of trustees of the Eureka Mining Co. of Utah.

A. I do not think I ever wrote the minutes of any meeting of the board of trustees of the Eureka Mining Co.

Q. If you state you did write such minutes, state by whom such minutes were worded and under whose directions they were written.

A. Said minutes were formed, worded, and directed by the defendant.

Q. State whether or not you ever had any settlement with Joab Lawrence of the matters in controversy here and growing out of the transactions which you have heretofore described.

A. I never had any such settlement with the defendant.

Q. State whether or not since the time said Joab Lawrence obtained possession of the 3,000 shares of the stock of the Eureka

86 Mining Co. of Utah and the Mansion House property in Detroit; said Joab Lawrence has claimed that he held the stock and real property otherwise than jointly for himself and for the benefit of yourself and John N. Whitney.

A. He never has made any such claim.

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My duties as secretary were to keep the minutes of the meetings of the stockholders and trustees and the record of the transfer of stock. Among other things, it was my duty to keep the minutes of the meetings of the board of trustees and of the company.

87 Lawrence usually wrote the minutes in the minute book, and I appended my signature as secretary. Such records, when signed by me, were correct to the best of my knowledge; I thought they were correct when I signed them.

Lawrence brought it (the note) to me December 7, 1871, when I cancelled my signature and returned it to him, it being his property and obligation.

I never borrowed money of the defendant in any amount.

I bought 250 shares of the Eureka Mining Co. of Utah stock, issued in my name just after the incorporation. This purchase was in July, 1871. I agreed to pay Lawrence $50 per share and paid defendant $12,500 for the same Dec. 6, 1871.

I dictated no minutes of any meeting of the board of trustees and do not think I wrote or kept any minutes of other meetings. I was secretary at that time, and any minutes that may have been written or signed by me were correct to the best of my knowledge. Not having examined the check drawn by Lawrence at that time nor having seen the check returned from the bank, I am unable to state its amount.

I kept the books of the Eureka Mining Co. in the manner that I have before indicated. I did not write the minutes of the meetings of the board of trustees of the Eureka Mining Co. Such records, when signed by me, were correct to the best of my knowledge; I thought they were when I signed them.

I have not personally made a demand upon defendant for an accounting, the reason being that Lawrence invariably told me that there were no profits arising from the Eureka Hill stock or from the property in Detroit.

88 My knowledge of the delivery of 3,000 shares of the Eureka Hill Mining Company's stock to the defendant as the result of a compromise and foreclosure of the mortgage was re-

ceived from defendant and corroborated by parties connected with the Eureka Hill Mining Co. I did nothing personally with the foreclosure or with the arrangement of the terms on which such 3,000 shares were delivered to the defendant other than to be consulted by the defendant at times as to what was considered best to be done in that respect. The defendant told me after the compromise that he had received the 3,000 shares.

I first learned the results of said foreclosure, and that the defendant on conclusion thereof had come into possession of 3,000 shares of the stock of the Eureka Hill Mining Co., when I received a letter from Whitney, some time in April, 1877. Although I talked with Lawrence a number of times about the stock, I at no time made any personal demand upon him, as I was willing that he should keep it.

The witness Wood on cross-examination identified & produced certain letters received by him from plaintiff Whitney, & the same were introduced in evidence by def't & are hereto annexed, marked Exhibits No. 50, 51, 52, 53, 54.

89 On page 35, line 14, after the word "them," insert "I received two papers acknowledging part of consideration, one dated Salt Lake, November 9, 1872; one being a letter written from Fairhaven, New Jersey, in 1875. The first I have been unable to find after diligent search among my effects; the other I mailed to my attorney, J. G. Sutherland, in Salt Lake last May. I didn't ask him for any more. I have not in my possession the paper delivered to me by Lawrence. I don't know when it left my possession or what has become of it, unless Schedule 'A,' annexed to the cross-interrogatories, is the original. I did not deliver it to the defendant."

It was admitted on the trial by counsel for plaintiff and defendant that Schedule A, above referred to, was the original declaration so given to Wood on November 9, 1872, and that the same was found among the papers of Joab Lawrence at the time of his death.

90 Counsel for defendant next called a witness, RICHARD MACKINTOSH, who testified as follows, to wit:

Direct examination by Mr. MARSHALL:

Q. I believe you testified that you knew Joab Lawrence very well?

A. Yes, sir.

Q. Where did you reside from 1876 to 1885?

A. In Salt Lake.

Q. Do you know where Joab Lawrence resided between those two dates?

A. Between 1876 and 1885?

Q. Yes, sir.

A. Salt Lake.

Q. Was he absent from Salt Lake during those dates for any considerable length of time?

A. Between 1876 and 1885?

Q. Yes, sir.

A. I think—well, I will state it in this way, that in 1883 or 1884 I was one day talking to Lawrence, and I used to be in his office a good deal, and we were talking about going off—it was in the winter time—about taking a trip, and saying that he hadn't been away for some time, &c., and I said, "Well, let's go on a trip, Joab," and he said, "Well, where shall we go?" and I said, "Let's go South, down to Mississippi, around there and around to New Orleans." So that was the first of that talk. I know a day or two afterwards I see him again. Well, says I, "Joab, I am going off; you had better go along, too." "Well," says he, "I have been talking to my wife, and I think we will." Well, Mrs. Lawrence and Joab and myself took the trip; took a summer, and went down to New Orleans and all through that country. Now, Lawrence had been very little
91 out of Salt Lake up to that time. I think that was about the first trip of any length that he took out of Salt Lake; he may have made a trip to New York and back on business.

Mr. JUDD: When did you fix that time?

A. That was in the winter of 1883 or 1884; about 1884, I think it may have been. I don't think it was in 1885, but it was 1884, I think. Well, up to that time Lawrence hadn't left here—I don't think hardly anything, excepting he was—been away in New York. When he was in that Eureka trouble he was off several weeks.

Mr. BENNETT:

Q. That was earlier?

A. Oh, that was earlier than 1876. Well, I don't think Mr. Lawrence was away from Salt Lake but very little; just like myself, took a run to New York or San Francisco, as the case might be.

Q. How long would he be away on such a run as that?

A. Oh, a month or two months; I don't think I ever knew him to go away longer. The following winter was the first winter that he was taken sick—I don't know whether that was the same winter or not—no, that was after, for I recollect now he was taken sick in Salt Lake; his sickness—what was that doctor's name, the one—Bliss?

Q. Yes, sir.

A. Well, Dr. Bliss attended to him, or at least he went and had consultation after he left New York with Dr. Bliss, and the reason I recollect it was his relating the whole of the symptoms, &c., that Bliss told him.

Q. Calling your attention again to that trip down to New Orleans, how long were you gone on that occasion, how long was Captain Lawrence away from the city?

92 A. Well, I left Lawrence and Mrs. Lawrence in New York. I think I went to Canada. I am not exactly certain after leaving New York he was gone a month or so, and I was gone between two and three months—two and three months, I guess.

Q. And he about four, then; was that it?

A. Well, I remember that was about it.

Q. Give me your best judgment about the length of time Capt. Lawrence was absent from Utah Territory from the 1st of January, 1876, to the 1st of January, 1884, prior to your New Orleans trip.

A. Well, I could not do that excepting that I know—if my memory serves me right, it was from—semi-occasionally when he would go away. I was doing business with him probably every week all the time, and he would leave for a month or six weeks or two months. I don't think he ever went away much longer than that.

Q. Were those trips frequent during that time?

A. No; they were not; he stuck very closely.

Cross-examination of RICHARD MACKINTOSH by Mr. JUDD:

Q. How long have you know- Joab Lawrence?

A. Well, I have known him ever since I first came to Salt Lake. I think we both came about the same year.

Q. When was that?

A. In 1871. I think he came prior, probably—I don't know, I think it was the same year.

Q. I believe you have already stated, if you have not, I will now ask you, what was the character of your knowledge and acquaintance of Joab Lawrence; was it intimate or otherwise?

Q. Was it intimate?

93 Q. Your knowledge of him and your acquaintance of him.

A. Yes, sir.

Q. Was he a single or married man when you first knew him?

A. Single man.

Q. When did he marry?

Mr. DICKSON: We object to this as not cross-examination and immaterial both.

The COURT: How does that become material?

Mr. JUDD: Well, it is simply an inducement to something I am coming to directly, if your honor please. Your honor will see its importance. I don't care to state now.

The COURT: It don't seem to me it would be cross-examination.

Mr. JUDD: Then I will make the witness my own for the purpose of this. I don't want to have to recall him again. Answer the question. When was it that he was married?

Mr. MARSHALL: We make the objection that it is immaterial.

The COURT: Under the statement of counsel it may go in.

Exception.

A. Well, now, I cannot say when he was married. I heard of his being married to Mrs. Lawrence at the hotel—at the Continental hotel—when she was so ill there. I recollect that circumstance, and I was told that was Captain Lawrence's wife. I heard of a lady being sick there with Doctor Hamilton. I recollect all about that.

Q. Well, about the time?

A. I could not tell you what year that was.

Q. When did he die?

A. Oh, it was in the seventies; I think it was in the seven-
94 ties; must have been '79 or '80.

Q. About how many years before he died, if you remember?

A. Well, he died two or three—two years ago, didn't he—eight or ten years?

Q. Now, I will put this question to you whether or not Joab Lawrence was a man who was of a strong and determined will, who was an aggressive man, who was inclined to run things, so to speak, who managed and controlled those around about *how* and such affairs as he was connected with and others in connection with those affairs, or whether, on the contrary, he was a man of easy disposition, who readily submitted to the control of others, or was easily quieted or influenced in his affairs of life or any business affairs.

Mr. DICKSON: We object to that as irrelevant and immaterial.

The COURT: Well, in and of itself it certainly would be immaterial—that is, so far as anything appears now in this case, but I understand counsel will make it material or show its materiality further on.

Mr. JUDD: Yes, sir; I will state now, if the court please, and will state to your honor the ground upon which I put this. Every lawsuit, of course, of any consequence involves the history. It becomes important for the court to know the charateristics of the parties to that lawsuit, in determining the history of it, as it does very often to know the acts of the parties. Now, in will cases it is always a subject where undue influence is asserted or where it is asserted that a will is obtained by fraud—it is always a sub-
95 ject of inquiry as to characteristics of the supposed testator whether he was a man of strong and determined will and a man who asserted himself on all occasions, a man who wouldn't brook opposition, or whether, on the other hand, he was a man of opposite character. Your honor has seen enough of the cross-examination and enough of the character of proof already started by the defendants in examining their witnesses in reference to *to hand* right to show an attack is made here at once upon the character of this plaintiff. The attack is, of course, that Whitney forged this instrument. Of course, in the progress of the cause we shall introduce witnesses before your honor as to the character of the man, both as to his truth and veracity and to his character for honesty and fair dealing, which we have a right to put in wherever that trait of character becomes involved. Now, we are compelled, as I may infer, to prove by this witness that Joab Lawrence was a man of very strong and determined will. It has already been developed here that Lawrence run this thing; that Wood did whatever Lawrence asked him to do; that Lawrence dictated part of the minutes of the proceedings of the meeting that he wrote upon the record; that all the secretary, Wood, did was to sign his name to that which

Lawrence wrote. Now, we propose to prove by this witness that Lawrence was a man of strong and determined character; that he was a man who did not brook opposition; that he was a very large man, a man of commanding appearance, a man that could easily overawe a timid man, and that he was a man who run things with which he was connected, so far as he was concerned, and that if he could not have things his own way he wouldn't have
96 them at all, with a view to show just the character of the man and as illustrating these transactions——

The COURT: In other words, to prove that the fact in controversy is that of his conduct generally——

Mr. JUDD: Yes, sir.

The COURT: Well, I don't see that it is improper.

Mr. DICKSON: Note an exception.

The COURT: I think it may be shown.

Q. Proceed and answer the question.

A. Your question was a pretty long one; you wanted to know from me what I thought about the character of Joab Lawrence.

(Question read.)

Q. Now, tell his character with reference to those things which I have asked.

Mr. MARSHALL: One question at a time. I will ask witness to answer the first question before any other question be put to him.

Mr. JUDD: I have a right to change the form of the question.

Mr. MARSHALL: I would ask them to strike out the first question.

The COURT: It is one continuous question. There are a good many in one.

Mr. BROWN: He has added something to it now.

(Question read.)

The COURT: If the witness can answer that general question from his acquaintance with him he may do so.

Mr. MARSHALL: Your honor will note an exception.

A. Well, I can answer in this way, that as the question is put I would take the affirmative side of that question.

97 Q. State in your own language what was his character in that regard.

A. Captain Lawrence was, first of all, a very secretive man, in my opinion.

Mr. MARSHALL: That is not responsive to the question. I ask to strike it out.

Mr. BROWN: We want it in.

(Motion denied and exception noted.)

A. Joab Lawrence was a man of strong personal character. What he undertook to do in business affairs he did it upon his own judgment. He was a man, I think, that concealed every fact as to the methods—concealed that from others to form any opinion. He was a man that pondered and thought a good deal of what he was doing. He kept his own counsels a great deal and a very fully determined

man. When he undertook a thing he wanted to carry it through. One other point about him, that I always thought he was a man that didn't want to have any control or other influence around him. He wanted to be the controlling spirit in any business or enterprise that he might join. He would like to have control of everything, as you say—mining deals—that he always wanted to control. He would have the whole business in his own hand and have others around to be his lieutenants to do in his own way. That is about as near as I can come — it.

Q. You say you believe he was a secretive man?

A. Yes, sir; in his affairs a very secretive man.

Q. Aggressive, was he?

Mr. MARSHALL: We object as immaterial.

A. Yes; in his affairs.

98 Q. He was in business affairs?

A. In business affairs.

Mr. MARSHALL: If your honor please, I will take a ruling on that question. We object to it as immaterial.

The COURT: I think it going a good ways, probably, but yet it is not improper.

Mr. DICKSON: It is the first time I have ever heard of a partie's character being thrown in question when there is no issue made as — this character, when he is not called to the stand. We insist upon our objection as to this testimony, and move to strike it out.

The COURT: The objection will be overruled.

Mr. JUDD: I now want to examine Mr. Mackintosh with reference to a matter that I don't want to call him back. It is rebutting. I want to examine him with reference to the character of Mr. Whitney.

Mr. DICKSON: We submit that it is not in issue.

Q. What was Joab Lawrence's personal appearance?

A. Very striking.

Mr. MARSHALL: We will take a ruling on that.

Q. Whether it was commanding.

The COURT: Whether he was a handsome man?

Q. Whether it was striking—commanding.

The COURT: He may answer that.

(Exception.)

A. Well, he was a very striking man. If you met him on the street you would probably turn around and look at him if you got a good look at him.

Q. Large or small man?

A. Large.

Mr. MARSHALL:

Q. What was Captain Lawrence's age when he died?

99 A. I am going to guess at it. Captain Lawrence must have been 56 or 57—56 to 58, I think.

Q. In 1888, at the time of his death, about 60 years old then, if he had lived until this time?

A. I think so; yes.

100 W. G. GALLIGHER, a witness in behalf of the defendants, testified:

That he knew John N. Whitney, a witness herein, intimately. That during the year 1879 he had a conversation with the said Whitney, in which Whitney said he was greatly in need of money; that he would have to go to work at a salary, and desired employment, and wished witness to use his influence to get him a position buying cattle for a gentleman of Colorado.

MOYLAN C. FOX, a witness in behalf of defendants, testified as follows:

That he was the son-in-law of Joab Lawrence, deceased; that he lived in the city of Salt Lake in the years 1885, 1886 and 1887; that he was intimately acquainted with the deceased in his lifetime. That from the 24th day of October, 1885, to the 10th day of February, 1886, Joab Lawrence, the deceased, was continuously at his home in Salt Lake City, Utah Territory, and visited his effice daily during that period. That from the 1st day of November, 1886, to the 25th day of January, 1887, Lawrence was again in the said city of Salt Lake, and at his home in said city continuously.

The next witness to sustain the issue of the plaintiff was
101 L. S. HILLS, who testified as follows:

Direct examination by Mr. JUDD:

Q. Mr. Hills, you are the same person who has testified heretofore in this case?

A. I am.

Q. You know John N. Whitney?

A. I do.

Q. How long have you know- him?

A. I should think 15 or 20 years, to the best of my recollection.

Q. Are you able to say that you know his character for truth and veracity?

Mr. DICKSON: We object as not proper. We have not introduced any evidence as to his character for truth and veracity, and until we do introduce evidence of his character for truth and veracity the rule is very well settled, we take it, that they cannot introduce evidence as to his character until it is attacked.

Mr. JUDD: The attack is made directly upon the character of the witness for truth and veracity by introducing other witness- to prove what he says ain't true and didn't occur.

The COURT: They have not introduced evidence to show that he states falsehoods generally. They have some evidence tending to dispute statements that he made.

Mr. JUDD: If the court please, in order to make the record, I pro-

pose to prove by this witness, by H. G. McMillan, the clerk of the district court——

Mr. DICKSON: Have you conversed with them?

Mr. JUDD: Never mind now, I am not on the witness stand.

102 Mr. DICKSON: I asked the question whether or not you have conversed with them.

Mr. JUDD: I am not on the witness stand. By W. P. Noble, Mr. Carn, Mr. Lowe, F. H. Dyer, G. M. Scott, Robert Harkness, Martin Harkness, A. G. Campbell, W. G. Culmer, B. G. Raybould, William L. Pickard, Richard Mackintosh, and some four or five others, that they have know- Mr. Whitney for a period ranging from, say, 15 to 18 years, and that they are acquainted with his general character for truth and veracity, and that character is good, and that they would give him full faith and credit on his oath in a court of justice. Your honor rules that I may not prove that?

The COURT: Yes, sir.

Mr. JUDD: To which I make an exception.

The COURT: In civil cases, where a party is charged with fraud——

Mr. JUDD: I am coming to another branch of it now.

Q. Mr. Hills, you say you had known Mr. Whitney for 15 or 18 years, I believe?

A. 15 to 20 years, I said.

Q. Do you know his general character for honesty and fair dealing?

Mr. DICKSON: We object to that on the same ground; we have not made any attack upon his general character.

Mr. JUDD: I have authorities, if the court please, if your honor wants to stop to hear them now; they are conclusive on that subject.

The COURT: I don't believe that that testimony is admissible.

Mr. JUDD: Now, then, in order to make the record, I propose to prove by the same number of witnesses and the same persons that

103 I have named that they have known Mr. Whitney for 15 to 20 years, and that they know his general character in reference to honesty and fair dealing, and that that character is good, and your honor rules that I am not to prove that?

The COURT: Yes.

Mr. JUDD: To which I take an exception. Now I have made my record. Now, then, in the further progress of the cause I shall expect to argue this case to your honor, and if your honor changes your opinion my proposal is in and the court can consider the testimony. That is all, if the court please.

104 The next witness called for the plaintiff was JENNIE CHRISTIANSEN, who testified as follows:

Direct examination by Mr. BROWN:

Q. What is your full name?

A. Jennie Christensen.

Q. Where do you live?

A. I live in Salt Lake City, 155 North Center street.
Q. Did you know Joab Lawrence in his lifetime?
A. Yes, sir; I did.
Q. Did you live in the family—work for them?
A. Yes, sir; I lived with his daughter several years, off and on.
Q. Mrs. Fox?
A. Yes, sir.
Q. What years did you live with Mrs. Fox?
A. Well, the date of the years I do not exactly remember; but the last time it was in 1890.
Q. 1890, or 1889?
A. 1888 we went.
Q. You went to New York with Mr. and Mrs. Fox?
A. Mr. and Mrs. Fox; yes, sir.
Q. Did you return with them?
A. I returned with them.
Q. While in New York, did you live with Mr. and Mrs. Fox, or with Mr. Lawrence?
A. Mr. and Mrs. Fox.
Q. After you came back, do you remember seeing Mr. Lawrence again?
A. After I came back to Salt Lake?
Q. From New York; yes.
A. Yes; after they came back here I came to stay with them; they came here with Mr. Lawrence.
Q. Where did they live then?
A. At the Little house.
Q. What is now called the Grand?
A. Yes, sir.
105 Q. You lived with Mr. & Mrs. *Mrs.* Lawrence then?
A. At that time; yes, sir.
Q. How long did you live with Mr. and Mrs. Lawrence there in the Little house?
A. For about eight weeks.
Q. During that time did you see much of Mr. Lawrence?
A. Yes, sir. I saw him every day.
Q. You were where he was?
A. Yes, sir; I was where he was.
Q. In the room in which he was?
A. Yes, sir; part of the time.
Q. Where did you see him—in what room?
A. I would see him in the dining-room every day.
Q. Was he able to talk at that time?
A. Yes, sir; he was.
Q. Did you notice whether he could remember things from day to day or for a part of a day and another part?
A. Yes; he would very often ask me a question one day an- the same the next day.
Q. Well, what indication would you have that he remembered from one day to the other what he had said the day before?
A. Well, he asked on one occasion—it was whether the sign was

over his office—if his name was on the sign over his office. He was asking me that one day, and the next week he was asking me the same question.

Q. Well, was anything said as to that to show whether he remembered it from the week back or not?

A. Well, he just simply asked me the same question over again—if his name was over the office.

Q. Did he used to like to talk?

A. Yes, sir; at certain times he seemed to like to talk.

106 Q. With whom did he like to talk?

A. Well, he didn't—that I saw—he didn't talk with any one in particular except his own folks.

Q. Well, as to whether Mrs. Lawrence or the nurse, or which one?

A. Mrs. Lawrence and Mr. Fox and Mrs. Fox; also his nurse.

Q. Did he use reasonably long sentences?

A. Well, sometimes he would get out pretty long sentences, and sometimes they were shorter.

Q. I want to ask you if he could use sentences as long as those which I am going to propound to you. Suppose an interview between him and Mr. Whitney; suppose Mr. Whitney had called upon him and asked him how he was, and he should reply, "I am lots better." Was he able and was he in the habit of using as long sentences as that?

A. Oh, he used to say to me sometimes, "Oh, Jennie, I do want to get well so much." He used to say that much to me very often.

Q. I will ask you if he used as long sentences as this: "I am lots better, Mr. Whitney; did you think I look pretty well?"

A. I think he could use sentences the same as that.

Q. And on such a subject as that seemed to answer intelligently about it?

A. Yes, sir.

Q. Inquire intelligently whether "Last fall I could not raise my right arm at all; now I can get it clear up to my head." Could he say all that?

A. Yes, sir; I think he could.

Q. If he was asked as to smoking or as to his habits could he have replied, "Smoke all the time, Mr. Whitney; I don't see it hurts me any"?

A. I think he could say that as well.

107 Q. Could he say, "Mr. Whitney, I am anxious to go to Salt Lake and want to be in the boom"? Would he make as long a speech as that?

A. Yes, sir; he made one similar to that to me. He was asking me once, I remember—Mrs. Lawrence and a lady staying with her went off to spend the day—went off on the train at some little distance—and he said to me then, "Jennie," he says, "does the farm and all the cattle belong to Mr. Fox?" and I told him I had not heard but what it belonged to him. That was all I remember.

Q. Could he make a sentence as long as this. Suppose there had been a business transaction and Mr. Whitney had asked him about a business matter—about some Mansion House property in De-

troit—could he have replied in this way, "Mr. Whitney, about the Mansion House property, the subject which you were talking about before lunch, I will state that the Mansion House property remains the same as it did when we acquired it of Captain Ward, and, so far as the mining company's interest is concerned, out to Salt Lake, there, I hardly know myself what shape it is in; but I am going to Utah as soon as I am able to go, when we will get together — see how this matter does stand." Did you think he could say as much as that?

A. Well, I think he would have to make a great many stops between the sentences.

Q. But you think he had mind enough to say as much as——

A. I think he had mind enough to say that, but I know he would have to stop a good bit.

Q. I am not asking how long it would take nor how slow it would be, but you think he might have said as much as that?

A. I think he could.

108 Q. Where did he use to *to* talk with you and Mrs. Lawrence—what room?

A. It was always in the dining-room, when I was in the dining-room.

Q. Did he seem to like to get where you and Mrs. Lawrence were to talk?

A. Yes, sir; he seemed to like to be around to talk.

Q. You left New York some time in the spring before that, did you, with Mr. Fox?

A. March before; yes, sir.

Q. When Mr. Fox came you came?

A. I came at the same time.

Q. Was there an incident occurred about his making you a present which he enquired about when he saw you again here?

A. Yes, sir.

Q. State what the incident was and what he said with regard to it.

A. Mrs. Fox told me that he wanted to make me a present of a coat, and the coat was sent to me, and he came down a few times after the coat was sent to me, and I tried it on. He was in the parlor at that time, in New York, where Mrs. Fox was living, and he didn't seem to like the coat, and I had it changed.

Q. Mr. Lawrence did not seem to like it?

A. No, sir; Mr. Lawrence did not seem to like it.

Q. Then, afterwards did he enquire about it?

A. No, sir; he never enquired about it afterwards.

Q. But he remembered it?

A. He remembered it.

Q. He remembered to say that he didn't like it, that was it?

A. Yes, sir; I think he enquired after he came here—no, not after he came here.

Q. What did he say about it at this time? You say he didn't seem to like it.

A. He thought it was too long for me; it didn't fit me right.

109 Q. Did he say anything at that time about his having directed it to be given to you?

Mr. DICKSON: Don't lead her.

Mr. BROWN:

Q. Just state all he said.

A. No; he didn't say anything of that kind.

Q. How about his reading—did he read any?

A. Well, I always saw him—he had the newspaper lying at the side of his table, and he had his specks on, but as to saying whether he read it or not I couldn't say certainly.

Q. Did he smoke?

A. Yes, sir; he smoked.

Q. A good deal or not much?

A. Well, he seemed to smoke after his meals—every time after his meals.

Q. Did you ever see him have any letters or anything before him as if he was reading them?

A. I saw him at one time with a letter in his hand and he had his glasses on, but whether he was reading it or not I can't tell.

Q. Apparently he was reading it?

A. Well, he was looking at it.

Q. How frequently did he come to Mrs. Fox's house when you were living in New York?

A. Well, I can remember twice that he came there.

Q. Was there a nurse there—a man by the name of Adolphus A. Walters?

A. Yes, sir.

Q. Did he talk as much with him as with you and Mrs. Lawrence?

A. Yes, sir; I think he talked more with us than he did with him.

Q. You got my question wrong, but your answer explains.

Q. He talked more with you two than he did with the man?

110 A. Yes, sir.

Q. Did you know whether he liked that man Walters or not?

Mr. MARSHALL: We object to that as immaterial

Q. Well he seemed——

Q. From anything he said?

A. He didn't say anything to lead that he didn't like him, that I heard.

Q. Or any other indication did he give on that subject? If so, state what the indication was.

A. No, sir; none that I know of.

Cross-examination by Mr. DIXON:

Q. Can you remember anything that you heard Mr. Lawrence say to Mr. Fox in the fall of 1888?

A. No, sir; I cannot.

Q. Can you remember anything you ever heard him say to Mr. Fox in the fall of 1888?

A. No, sir.

Q. Not a thing—not a sentence? Can you remember the substance of any remark you heard him make to Mr. Fox in the fall of 1888?

A. No, sir; I don't remember any.

Q. Or to Mrs. Fox?

A. No, sir.

Q. You never heard him, in the fall of 1888, go through any such sentence as this, did you—you never heard him go on talking in this easy manner, did you? "Mr. Whitney, about the Mansion House property, the subject which you were talking about before lunch, I will state that the Mansion House property remains the same as it did when we acquired it from Captain Ward, and as far as the mining company's interest is concerned, out to Salt Lake,
111 there, I hardly know myself what shape it is in; but I am going to Utah as soon as I am able to go, when we will get together and see how this matter does stand." You never heard him talk any sentence like that, did you?

A. Well, he has made similar sentences when I have heard him speak, but he would have to make stops. He wouldn't say that right out.

Q. Did you ever hear him carry on a conversation as long as that without interruptions, without any questions being put to him?

A. No, sir.

Q. He had difficulty in talking at all?

A. Well, not always he hadn't; sometimes he would talk plainly.

Q. You had difficulty in understanding him, hadn't you?

A. I had no difficulty in understanding him whatever.

Q. Can you remember anything that he said—long sentences?

A. Well, he asked me one; was saying about the Richland property. He asked me if that belonged to Mr. Fox. "Jennie, does Richland and all the cattle there belong to Mr. Fox?"

Q. That would seem to indicate that he didn't know what he was talking about, wouldn't it?

A. No, sir.

Q. Had you ever heard any claim that the land and all the cattle belonged to Mr. Fox?

A. No, sir; I never heard it.

Q. You always understood that it belonged to Mr. Lawrence, didn't you?

A. I always understood it belonged to Mr. Lawrence.

Q. When did he ask you if his sign was over his office?

A. Yes, sir.

Q. And a day or two afterwards he asked you the same question?

A. Yes, sir.

Q. Apparently did not remember what you told him before?

A. I think he remembered it very well.

Q. Why did you think so? He asked you the same question again, didn't he?

A. Yes, sir.

112 The next witness called in support of the issues of the defendant was C. W. BENNETT, who testified as follows:

Mr. MARSHALL:

Q. You knew Joab Lawrence in his lifetime?

A. Very well.

Q. How long did you know him?

A. I knew him from 1872 on until the time of his death.

Q. Did you see him during the month of April, 1888?

A. I am not quite sure whether it was in April month, but if not in April in the early days of May, 1888.

Q. Where did you see him?

A. In New York city.

Q. What was his mental condition as to carrying on a conversation?

A. I went on purpose to consult in regard to the issues of this case. I could get nothing out of him at all, except it might be an answer yes or no.

Q. Did he show any signs of understanding you?

A. Would understand simple, very simple sentences, and sometimes give an intelligent answer; oftener, however, unintelligent answer to some questions.

Q. Did you try to awake his recollection by referring to various matters connected with the history of the case?

A. I did in detail.

Q. Books and papers?

A. Books and papers referred to; many of the same that are introduced here.

Q. Did he appear to comprehend you?

A. He didn't.

Mr. JUDD: When was that?

A. I can't give the date; early days of May, I think.

Mr. MARSHALL: Could he then form sentences anything
113 beyond monosyllables?

A. Impossible; I tested him on that, and one purpose of my visit was to test his mental condition with regard to the New York suit.

Q. State how long, if you know, his mental condition has been failing.

A. I think it commenced to fail in the autumn of 1886; not very noticeable, however, for some months; I hadn't seen him from the autumn of 1886 or early winter of 1887 until the time I now speak of in New York, when I found him very much worse.

Q. Do you know if any steps were taken by his friends or relatives to protect his estate from his own action?

A. Yes; during 1887 I had something to do with that myself; I had been attorney for him for many long years.

Q. Such steps were taken, were they?
A. Yes; by way of guarding—looking after transactions.
Q. No legal steps?
A. No legal steps.
Q. But a guard was placed over his business transactions?
A. Yes; a careful overlook.

Cross-examination.

By Mr. BROWN:

Q. Do you think 1886 was the first his mind was impaired?
A. I do.
Q. You had noticed no symptoms of it prior to that time?
A. I hadn't.
Q. Hadn't he been under physician's care for mental disease for more than a year?
A. Well, I can't tell that; if so I didn't know it.
114 Q. You didn't observe anything in his mental condition prior to 1886?
A. No; carried on his business intelligently in my office.
Q. You witnessed a will for him at one time, didn't you?
A. Yes.
Q. When was that?
A. In 1885.
Q. What time in 1885?
A. My impression is about August; I am not quite sure, though, about that.
Q. That was the will which was finally probated, was it?
A. It was.
Q. You thought he was mentally sound at that time?
A. He was undoubtedly so; I thought so.
Q. Of course, you would not have done it if you didn't?
A. It was pretty well witnessed, too; I wasn't the only one; Mr. Harkness and Mr. Kirkpatrick were with me.
Q. You think at that time you had seen no premonitions whatever of this mental disease?
A. I knew of none.
Q. The first you saw of it was some time in 1886?
A. My impression is, the latter part of 1886.
Q. Where was he then, in the latter part of 1886?
A. My recollection is not very definite about that, but I think he was here in the latter part of 1886; left in the early part of 1887, though he had been in Europe that year.
Q. Didn't he leave here early in the spring of 1885 and only returned for a short time after that until his final return?
A. My recollection is that he was here in the spring of 1885 and went East; whether he went to Europe I don't know; I returned here in the autumn of 1885.
115 Q. He only staid a few days, did he?
A. Remained two or three months, I remember. I had some important business with him.

Q. Stay as long as that—the autumn of 1885?

A. I think so. I remember of having had important business with him during that time.

Q. Well, you could do that if he was only here a day or two?

A. Well, he was here longer than that. I remember calling at his house. I remember attending a party at his house.

Q. In the autumn of 1885?

A. In the autumn of 1885, I am very sure it was. I couldn't be entirely positive. That is my recollection of it.

Q. And at that time you noticed no difficulty with him?

A. None whatever. I don't mean to say, now, that he didn't have premonitory symptoms. I simply mean to say I didn't notice any.

Q. In 1886 you began to notice his mind was failing him?

A. My impression was in the autumn of 1886 he began to show tremulous condition.

Q. What was the first condition you noticed?

A. Well, what the doctor spoke of—uncertainty of gait and nervous in conversation; a tremulous condition—is all I can state. Professionally, of course, as a physician, I know nothing about it.

Q. Did you notice anything in talking with him at that time?

A. I would notice, sometimes, a lapse of speech.

Q. What do you mean by lapse?

A. Well, uncertain expression of thought, but not very noticeable, I believe.

Q. During the principal part of 1886 he was away from town, wasn't he?

A. My memory is that he was.

Q. And 1887 the same?

116 A. 1887 I don't remember to have seen him here. He might have been here; but if so, only for a short time.

Q. In 1888 he wasn't here until September?

A. I think not. I was away. This I recollect——

Q. You were called East after he had been served in the New York suit?

A. Yes; for consultation.

Q. Before you come to that, I want to go back to these steps being taken to protect him, as you say. What sort of steps were taken?

A. Well, we were attorneys for him, and in important transactions we were extraordinarily cautious, especially Judge Harkness, who had particular charge of his business, looking after his contracts, as we thought he was weakening.

Q. Didn't set anybody to watch him to see he didn't trade away anything?

A. Oh, no; we didn't put a guard upon him.

Q. That is what I mean—secretly watch him.

A. What I mean to say is we were especially cautious.

Q. Do you know whether any secret watch was put over him to see what he was doing by his wife or any of the family?

A. I don't know.

Q. All the steps that you know of was that, as lawyers, you were particularly conscientious?

A. Well, I wouldn't say that; I wouldn't claim that.
Q. More so than commonly?
A. We were especially watchful.
Q. Looking after his interest and unusually careful; still, he had power to go ahead and do as he had a mind to, I suppose?
A. Oh, yes; he was under no restraint that I know of.
Q. Did you advise the appointment of a guardian at that time?
A. We never did.
Q. Didn't ask Mrs. Lawrence to see that a suitable guardian
117 was appointed to look after his property as being uncertain or unsafe?
A. Never did.
Q. She never suggested it to you?
A. No; that matter was never suggested to me until the time I speak of, when I went to New York.
Q. That was after we had sued him?
A. Yes.
Q. After suit had been brought, then it began to be talked about, I suppose?
A. It was talked.
Q. Up to that time it never had. Now, how long had it been since you had seen him when you went down to New York—a year and a half?
A. My impression is, it was something like that; I can't remember; in the meantime I had been abroad for several months. I simply knew that he was East and under the attendance of Dr. Seguin.
Q. Do you know about how much he was in Europe during that year and a half?
A. No; I don't.
Q. Now, when you went to the house who showed you in?
A. Well, they had their rooms in flats. I was shown in by the servants in charge.
Q. Well, when you went into the room was Mrs. Lawrence there?
A. Yes; Mrs. Lawrence was there.
Q. Mr. Fox with you?
A. Mr. Fox was there.
Q. You were shown in and Mrs. Lawrence was there with him?
A. Yes.
Q. She knew you were coming?
A. Oh, yes; we had been in the city then. I think this was the second day.
Q. You were not stopping with them?
A. Oh, no; to the hotel.
118 Q. You had been in the city a day or so?
A. I think we went the next day.
Q. They knew you were coming and everything was prepared to receive you?
A. Undoubtedly.
Q. What time of the day was it?

A. My impression is we went there about 11 o'clock in the morning; I couldn't be certain about it.

Q. When you first went up to Mr. Lawrence did you go up and say, "How do you do, Mr. Lawrence"?

A. Oh, yes; he sat in his chair.

Q. What reply did he make to that question, if anything?

A. Well, I really can't remember.

Q. Did he bow?

A. Yes.

Q. Say anything?

A. I think he said, "Good morning."

Q. Did he say, "How do you do, Mr. Bennett"?

A. I don't remember that he did. He may have.

Q. Did he call you by name?

A. No; I don't think he did.

Q. Did he seem to recognize you?

A. He didn't for quite a while, and only when I commenced to talk business matter, and I told him then why I had come on and that I wanted to consult with him in the matter.

Q. You think he did say something in reply to that salutation as how he did?

A. Yes; but I can't tell what—perhaps "Good morning."

Q. That, I understand, he spoke very slowly; he spoke very slowly, did he?

A. Well, I heard some words; he would say yes or no very promptly.

119 Q. But if he was going to say anything more it would be slow, would it?

A. Yes; and he said very little.

Q. Can you show us about how he would speak?

A. Well, I don't know that I can.

Q. Did you speak to him about Mr. Whitney?

A. I did.

Q. Did he seem to recognize the name Mr. Whitney?

A. Yes; he did after I explained as to business.

Q. You had know- of his and Whitney being intimate for a great many years, yourself?

A. Yes, sir.

Q. And when you mentioned Mr. Whitney's name did he seem to recognize it?

A. Yes.

Q. (Showing paper to witness.) This wasn't produced at that time?

A. No; I hadn't seen it then. It was lost about that time.

Q. Did you show him this other one, this Wood declaration, you had that in your possession at that time?

A. I am not certain about that. I had it with me, but whether I showed to him or not I am not sure.

Q. Do you remember of showing him any of the documents which we have used here on this trial?

A. Well, I can't designate any document, but I did show him

documents and I could notice that he couldn't read them intelligently.

Q. Can you tell me what documents they were?

A. No.

Q. Couldn't he read anything at all?

A. Didn't seem to me that he could.

Q. Sometimes have a newspaper before him?

A. Had a newspaper lying on a chair by his side.

Q. Of course he wouldn't be reading it when you were there?

120 A. No; that is one of the tests I undertook to make out, whether he could read manuscript.

Q. How long did you stay there that day with him?

A. Well, I had two sessions; first, in the morning, if I am right. I know it was in the morning hour, but what hour I couldn't tell, and then Mr. Fox and I went out, I think, with Captain Lawrence and his nurse and — a walk in the park.

Q. Was he able to walk?

A. Yes, with difficulty; supported by his nurse.

Q. You rode out to the park?

A. No; his house was just opposite to the park. I remember we took a little walk and then came back, and I renewed my effort to get information from him.

Q. When he was out walking did he say anything at all?

A. My recollection is he was substantially silent.

Q. Express himself at all in regard to what you said to him?

A. No; seemed to be in a dazed condition.

Q. When you came back you showed him more papers, did you?

A. If I may explain a little at length there. In the first place I tried to have him give me some connected story about it.

Q. About which?

A. About the Ward business, I had followed in that in the morning hour, and when we returned that is my best recollection of it—when we returned I took the matter up and made interrogatories to him upon special points as to the business. I don't recollect just what they were. In the morning hour I had had no satisfaction at all from the conversation.

Q. Did you ask him if he had used any of Wood's stock in making the exchange with Ward?

A. No; I didn't—that is, I don't remember having done so.

121 Q. Did you ask him if he had used any of Whitney's stock?

A. I don't think I did.

Q. Did you read him the complaint that had been filed?

A. No.

Q. Did you have it before you?

A. I think I had a copy of it.

Q. Did you ask him if he had signed any paper to Whitney?

A. I have no doubt I did; I don't recall it just now.

Q. And you don't recall what reply he made if he made any?

A. Yes; I do recall one reply.

Q. How can you recall the reply if you don't recall whether you asked him?

A. May I state just what I did say in that regard?

Q. Well, not quite. You can't recall the reply unless you can recall what you said, can you?

A. I know what I did in that regard and the reply.

Q. Did you ask him if he signed any paper to Whitney?

A. I don't think I did.

Q. Did you ask him if he ever settled with Whitney?

A. I did.

Q. What reply did he make to that?

A. He said yes.

Q. He said he had settled with him?

A. Monosyllable yes.

Q. That was his reply?

A. That was after the noon hour, after I came back.

Q. After you had talked with — the second time. Had you before that tried to explain to him the nature of Whitney's claim?

A. Yes; in a general way.

Q. So that if he had been intelligent enough and understood what it was, the reply of yes, he had settled, would apply to this statement that you had made?

A. It was a reply to my question; it is direct. In the
122 former conversation he wasn't able to give me any intelligent statement.

Q. My question is this, Judge Bennett, if he had been intelligent enough to comprehend what you had stated to him as to the nature of Whitney's claim—you had stated that to him?

A. Yes.

Q. His reply of settlement would have applied to that claim set up in that complaint?

A. Yes; but he did make the reply, Yes.

Q. What kind of a claim was it you asked him about when you asked him if he had stated?

A. Well, I told him in a general way the claim made in the New York suit and asked him about the Ward trade.

Q. Asked him if he had settled with Whitney and he said, Yes?

A. Yes.

Q. Did you ask him the same question as to Wood?

A. No; I don't think I did. I hadn't the Wood case much in mind then.

Q. Well, they were jointly there?

A. Well, I don't think we spoke of that much. I don't remember now speaking of it at all.

Q. You had before you went down East on that trip taken from his papers here all you could find, had you? These papers were found in his papers here, not in his papers in New York?

A. No; all found here.

Q. All found here; whatever has been produced by your side?

A. Yes; as far as I know.

Q. So that you had taken them down there. You don't think you showed him this Wood declaration?

A. I don't remember to have shown it to him.

123 Q. Or ask anything about it?

A. In fact, I don't remember now whether I had it with me at that time,

Q. You say that you showed him documents and that the test that you made was whether he could read those documents or not?

A. Well, that is a part of it.

Q. Now, can you tell me any of the documents which you showed him?

A. I don't recall now, particularly.

Q. In one document, one of the lot that you could say had been shown to him?

A. We had plenty of them there.

Q. Did you show him any of the Whitney letters, could you say?

A. Well, I can't remember. I doubt whether I did.

Q. You drew that answer, didn't you?

A. The New York answer?

Q. Yes.

A. Well, it was drawn while I was in New York. Mr. Miller drew it.

Q. Well, inspired by you, substantially—under your direction?

A. We consulted over it.

Q. It was under your advice and direction it was drawn, as you knew more about it than Miller did. He merely followed what you dictated.

A. Yes; it was drawn by Mr. Miller there, in consultation with Mr. Choate and myself.

Q. You also drew certain affidavits there, did you not?

A. No.

Q. For Mrs. Lawrence to swear to, didn't you?

A. No; those were drawn afterwards; at least I have information they were.

Q. Whatever you did there was after this talk with Lawrence, wasn't it?

A. Yes.

Q. You think that affidavit of Mrs. Lawrence was not drawn by you or under your direction?

A. It was not.

124 Q And not drawn while you were in New York?

A. Well, I couldn't say that; not to my knowledge.

Q. Can you give me, with any more accuracy, the time when you arrived and when you left New York?

A. I cannot at this moment. I can by going to my office and referring to the dates there.

Q. I wish you would, after dinner, get me the dates, if you can, when you left New York.

A. I think I can give that. I can approximate it very closely, at all events.

Q. Did you make any other effort to see Mr. Lawrence after the first day?

A. Yes; I saw him several times while I was in New York.

Q. Mrs. Miller always there, I suppose?

A. Yes; I think on every occasion. I can't be quite sure—no. I remember one time I called just as I was coming away, I didn't see Mr. Lawrence. The nurse was there.

Q. This man nurse?

A. Mr. Walters; yes, sir.

Q. He staid with him all the time, did he?

A. Well, I saw him with him whenever I saw Captain Lawrence.

Q. He was the same man that came here with him?

A. Yes, sir.

Q. You saw Mr. Lawrence after he was here, I suppose?

A. Yes.

Q. How much?

A. Well, I think I called on him twice.

Q. At the house?

A. Yes.

Q. See him out?

A. No; I didn't.

Q. Used to ride a great deal, didn't he?

A. I don't know as to that. I heard he was out.

Q. Did you try to talk with him when you was there about any of his affairs that would naturally interest him—his other
125 friends here?

A. Oh, yes; I tested him on many things, at least tried to test him.

Q. What friends did you ask him about, do you remember?

A. I asked him about Mr. Fox's family—his children—to get him to converse if he could or would.

Q. On those children?

A. Yes; that is one thing that happens to occur to me.

Q. He didn't talk about them?

A. No; he didn't seem to formulate any idea in regard to them.

Q. Did you ask him about his farm here or say anything about it?

A. I remember, now you call attention, I asked him about his animals.

Q. His cattle?

A. His stock farm.

Q. Black and white cattle—it was a thing he used to take a good deal of pride in?

A. Yes.

Q. What did he say about that?

A. Seemed to be a blank to that.

Q. Say anything about that?

A. No; I cannot remember that he——

Q. (Interrupting.) Say anything about his office here?

A. No; I don't think that subject was up at all. I don't remember that he said anything about that.

Q. But he didn't say anything to you about his cattle when you spoke about them?

A. No; the impression was that it was a blank to his mind—had gone out of his mind.

Q. When you were explaining to him about these Whitney matters did he seem to comprehend the nature of them?

126 A. No; not in a general sense, only when I was asking him a definite question.

Q. When he said that he had settled that claim—when you asked him if he had settled that claim and he answered yes, you thought he comprehended it, didn't you?

A. Yes; he did, too.

Q. You thought that he understood?

A. I think so. I might explain there. I asked him if it had been settled and he said, "Yes; settled, settled, settled, settled," pounding his chair (illustrating).

Q. In that way?

A. Yes.

Q. So that it wasn't merely the monosyllable "yes" that he said?

A. No; it was a repetition.

Q. Not only "yes," but it was "settled" that he used?

A. Yes.

Q. And you explained to him just before that the full history of the business?

A. As well as I could.

Q. And the lawsuit. On the strength of that answer you put in an issue there that the claim had been settled, didn't you?

A. I wouldn't say it was on the strength of that answer. I had other evidence.

Q. Well, wasn't it on the strength of that answer?

A. No; not entirely; partly.

Q. Wasn't it because he answered that it was settled that you put that issue in in that way?

A. No; it was not; on a general consultation touching the whole case. I think it is all on information and belief.

Q. I presume so. It would be, anyway. Fox had to swear to it. Will you get me that other date after dinner?

A. I will try to. I think I have it.

127 TUESDAY, *July* 1, 1891—a. m.

Dr. J. F. HAMILTON, being sworn as a witness in behalf of the defence, testified as follows:

Direct examination by Mr. MARSHALL:

Q. Doctor, you reside in this city, I believe?

A. Yes, sir.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you practiced that profession?
A. Since 1856.
Q. How long in Salt Lake City?
A. Since 1871.
Q. Did you know Joab Lawrence in his lifetime?
A. Yes, sir.
Q. Did you treat him for the disease that finally proved fatal?
A. Yes, sir.
Q. During what period of time?
A. I will have to run over my memorandum book in order to answer that correctly; I brought it down in order to refresh my mind. (Refers to book.) Well, I treated him during the year 1885 and portion of 1886 and then again in his last illness here.
Q. At what time was that?
A. The last illness?
Q. Yes, sir.
A. Commencing on September 28th, 1888.
Q. When did he die; do you know?
Mr. JUDD: Does your book show 1888, Doctor?
A. Yes, sir.
Q. The counsel suggested 1888. Did you say 1888?
128 A. I have charges against him in 1886 and 1887, account brought forward in 1888; then in September and October of the year 1888—no, it can't be 1888. Well, I will have to get a book that I haven't got here. September 28th and 29th—this entry was made by my book-keeper, but it comes under the head of 1888, and I take it that was in 1888.

Mr. MARSHALL:

Q. Do you know whether it was the same year before he died?
A. Oh, yes; September before he died.
Q. To refresh your recollection, I will ask you if he didn't die in December of that year.
A. Yes, sir.
Q. December, 1888?
A. My last visit to him was on the 29th of December; he died about that time, I think.
Q. What did he die of, Doctor—what was the disease?
A. Died of softening of the brain.
Q. Was he suffering from that disease in 1885?
A. Yes, sir.
Q. The same disease?
A. He had the premonitory symptoms.
Q. What are the general characteristics of that disease—is it continuous or is it subject to lucid intervals and reactions?
A. Well, it is known as a progressive disease; it is characterized by loss of memory and diseased condition of the mental faculties, and is usually progressive, and when it assumes the form of dementia it is regarded as a progressive disease; destruction of tissue commences and gradually progresses.

Q. Destruction of brain tissue?
A. Yes, sir.
Q. When did you last see him prior to September 28, 1888?
A. I think it was in January, 1887; I have charges in January, 1887, and I have charges in November, 1886.
129 Q. Was his disease such that, seeing him in September, 1888, you could form an intelligent judgment on his condition in April prior to that time, keeping in mind its continuous character?
A. Why, yes, I should think so.
Q. Was it a case you felt any special interest in?
A. Great interest; it was under my observation for years here, and I was in correspondence with his physician in New York during these years more or less.
Q. What physician was that?
A. Seguin.
Q. Dr. E. C. Seguin?
A. Yes.
Q. Is he a specialist?
A. Yes, sir.

Mr. BROWN: I object to that inquiry as immaterial—not proper to ask somebody else about the character of their other witness.
Mr. MARSHALL: As to an expert, if the court please, I apprehend it is proved by either the witness himself or by others.
The COURT: I think that is proper.
Exception by plaintiff.

Q. You say he was a specialist in mental diseases?
A. Mental diseases; yes, sir.
Q. Do you know what his general reputation in this country is as such specialist among physicians?

Mr. BROWN: I object to it as entirely irrelevant, immaterial, and hearsay; not proper to prove Seguin's reputation.
The COURT: I think that is proper.
Exception by plaintiff.

A. He stands at the head of the profession—recognized as the best authority, or among the very best.
130 Q. In that particular department?
A. Yes, sir; in that particular department.
Q. When you saw Captain Lawrence in September, 1888, what was his condition as to being able to carry on a conversation?
A. He wasn't able to.
Q. Was he able to express consecutive ideas?
A. No, sir.
Q. What seemed to be the difficulty?
A. Well, he was unable to articulate, for one case; another, there wasn't the mental strength to think.
Q. How is that?
A. He wasn't able to think co-ordinately.
Q. He wasn't able to co-ordinate ideas? Doctor, after that dis-

ease has progressed to such an extent that a man is unable to co-ordinate ideas, whether from organic destruction of the tissue or loss of memory, whatever it is, state whether he ever revives or there is ever a reaction so that he regains this power.

A. I think not, sir.

Q. Why?

A. Brain disease—softening of the brain is absolute destruction of the tissue—brain substance—and it is not replaced or restored.

Q. I will read to you what is claimed to be a conversation with Captain Lawrence on April 6th, 1888, and ask you whether, in your judgment, he could have carried on such a conversation, taking into consideration your knowledge of the case and what you saw of it in September, 1888, and prior thereto. It is claimed, I believe, that Mr. Lawrence made the following remark: "Mr. Whitney, about the Mansion House property, the subject which you
131 were talking about before lunch, I will state that the Mansion House property remains the same as it did when we acquired it of Captain Ward; and so far as the mining company's interest is concerned out to Salt Lake there, I hardly know myself what shape it is in, but I am coming to Utah just as soon as I am able to come, when we will get together an- see how this matter does stand."

A. That was about six months prior to the time I saw him.

Q. That was in April, 1888?

A. April, and I saw him in September. Well, judging from the character of the disease, the condition the man was in when I saw him last, say nothing of the information that I received from him from time to time through his physician, I should say not—probably not.

Q. Have you in your own mind, Doctor, any doubt about Mr. Lawrence being unable to make that remark at that time?

Mr. BROWN: I object to that question as leading and improper.

The COURT: He stated what his opinion was. I think that is sufficient.

Cross-examination of Dr. HAMILTON by Mr. JUDD:

Q. Doctor, when did you say you treated him there the first time?

A. Well, I treated him prior to the dates I gave here, but——

Q. (Interrupting.) I am only asking as to those dates you gave there.

A. I treated him in November, 1886, and December, 1887.

Q. Didn't you say something about 1885?

A. Yes; I treated him prior to that also. He was a patient of mine prior to that, I think; yes, sir; he was a patient of mine as far back as 1882 and 1885.

132 Q. Well, I suppose he just had the belly-ache then? I am now getting at the time you testified to. I don't care to go back to those little visits. In 1885 you spoke of treating him, in answer to Mr. Marshall. I wanted to begin with the dates at which they begun, that is all.

A. Well, I treated him in 1885, during the months of May, July, September, October, and November.

Q. What did you treat him for during those months of 1885?

A. Well, he had kidney troubles; he had pains; he had aches, and there were well-marked symptoms back in 1885. In 1885 these symptoms made their appearance as dementia.

Q. What symptoms?

A. Symptoms of loss of memory, failure to—his gait was unsteady; it was with an effort that he walked—made an effort to walk; he hardly had control of his limbs.

Q. What time in the year 1885 was it, Doctor, you first discovered that?

A. Well, he was under continuous treatment in 1885, and during the months of May, July, September, October, and November, and I am aware of the fact that he manifested symptoms of brain trouble as far back as that; it was a weakened condition.

Q. Well, did he leave Salt Lake in November of 1885?

A. Well, I have to turn to my—I think he left in December of 1885.

Q. Where did he go?

A. He went East.

Q. Go to Europe?

A. I understood so.

Q. How long was he gone?

A. Well, I infer from my book here that he left in December, 1885, and returned some time in November, 1886.

Q. Was gone about a year?

A. Yes, sir; about a year.

133 Q. Well, when did you next see him to treat him? Was it in the month of December, 1887?

A. Saw him in 1886, November and December.

Q. 1886, I mean?

A. Yes, sir; January, 1887.

Q. Did you treat him for anything then?

A. Yes, sir.

Q. Do you remember what it was?

A. It was this condition of the brain breaking down. I anticipated——

Q. (Interrupting.) I didn't ask you what you anticipated. I ask you what you treated him for.

A. Well, this condition—his condition was one of dementia.

Q. That was in November, 1886, and January, 1887?

A. Weakened condition; I won't say complete dementia, but he was in a weakened condition; his brain was undergoing changes; there was destruction of the tissue, I believe, at that time, and the history of the case showed it.

Q. How long did he stay here during that trip or did he go away again; and, if so, when?

A. January 8th. I think he must have left about that time in January because I have no——

Q. (Interrupting.) Well, what is your recollection, independent of your book, that he left?

A. I have no recollection—no definite recollection outside of that, sir.

Q. Well, what do you say as to when he did leave?

A. I say he left in January.

Q. 1887?

A. Yes, sir.

Q. Where did he go?

A. He went East.

Q. Go to Europe?

A. I understood so. I don't know.

Q. How long was he gone before you saw him any more; from January, 1887, until when did you see him again?

134 A. I saw him again in September, 1888.

Q. That was nearly a year and eight months that you didn't see him at all?

A. Yes, sir.

Q. Well, you didn't know anything about what his condition was when he was away from you, only in so far as you can gather it from what you knew of the history of the case before he went away and after he came back—that is what I am speaking from. I looked at the fact of correspondence with his physicians.

Mr. JUDD: May it please your honor, I submit that is not competent. I don't want him to speak of his correspondence.

The COURT: I don't understand him to be testifying from that.

Mr. JUDD:

Q. I want your judgment what you know of the case independently of any correspondence that you may have had with any other physician about him at all.

A. I have no personal knowledge whatever, sir; no means of any personal knowledge.

Q. Then you don't undertake to say from your personal knowledge of the man what his mental condition was during the time he was away from you, do you?

A. Well, I undertake and did say that the disease and the condition the man left here in, I regarded the disease as progressive and in no manner having any tendency to recover; on the contrary, the disease was a progressive disease, going on gradually from bad to worse.

Q. I perfectly understood that; but what I ask you is this: Do you undertake to say that you know his mental condition during those eighteen or twenty months that he was away from you and what he was capable of during that time any further than

135 what you would judge as a physician from his condition when he left and his condition when you saw him after he came back?

Q. That is just exactly what I would judge from and only from that; I didn't see him personally.

Q. Now, laying out of your mind this correspondence that you speak of having with some other physician or physicians and speaking alone from your own knowledge, would you say he could or could not make such answers to questions as were read to you by Mr. Marshall in April of 1888, in New York?

A. It was my opinion he would be unable to.

Q. That is your opinion?

A. Yes, sir.

Q. And you base that upon what you saw of him six months after the time fixed?

A. When he came back.

Q. When he was here in Salt Lake City before he left in January, 1887, did he go around the streets and attend to his business?

A. He didn't give close attention to business, I think, and I think that, while he was in the streets some, he was seldom on the streets.

Q. Did he have an office here during that time?

A. Yes, sir.

Q. Wasn't he in his office during that time?

A. He was.

Q. Almost daily?

A. I presume so; I often saw him there.

Q. Mr. Lawrence was a man who had a very large estate, wasn't he?

A. I understand so.

Mr. MARSHALL: We object as immaterial.

The COURT: He may answer.

A. Yes, sir.

Q. He was a man who had a very large estate, wasn't he?

136 A. I understand so.

Q. Consisting in what kind of properties?

A. Well, I know very little of that; I know nothing, only hearsay; I suppose money and stocks—good securities.

Q. About how much estate would you say, from your understanding, he was possessed of at these times you have testified about his mental condition?

A. I have no means of knowing anything excepting from hearsay.

Q. What would you say?

Mr. MARSHALL: We object because it does call for hearsay. He has no means of knowing, he says, anything about it.

Mr. JUDD: I only want to show in a general way, if the court please; also as to follow it up with another question.

(Question waived.)

Q. You say it was very large, the estate?

A. I understood it was.

Q. Now, Doctor, during this time was there any guardianship put over Mr. Lawrence in the management of his property?

Mr. DICKSON: We object to this as not cross-examination.

The COURT: Well, if he knows he may answer.

Exception taken by defence.

A. I understand that there was a guardianship. I know that there was a question as to his competency and ability to do business.

Q. I ask you this question: If there were any steps taken by any one, and, if so, whom, to put him under guardianship—to take away from him the control of his estate and business.

A. I understand that there was; I don't know.

137 Q. You know of no such proceeding?

A. No, sir; no legal proceeding.

Q. Do you know of any sort of proceeding?

A. I know watchful care that was thrown around him and guards that were thrown about him.

Q. In the management of his business?

A. Yes, sir.

Q. When?

A. I think it was in 1887.

Q. What time in 1887?

A. Well, I would have to refer again to my books.

Q. You said he left here in January, 1887, and you didn't see him any more until September, 1888?

A. Well, I just want to refer to my ledger here in order to get those dates correct, sir. I know that some — prior to his leaving—you asked me the question in relation to his ability to do business and guardianship, and then anything that assumed that shape—I went on one occasion to the bank——

Q. (Interrupting.) I don't ask you, Doctor, what you did at all.

Mr. DICKSON: Well, we ask that he be permitted to state what he did and at whose instance—whether it was at the instance of the relatives of the deceased—in answer to the question.

The COURT: You can bring that out on re-examination.

Mr. JUDD: Well, I am willing for him to answer it. Go on, Doctor, and answer it.

A. I will answer any question. You put the question again; I don't exactly recall it now. I was going to tell you what I did myself.

Q. Go on and tell it.

138 A. Well, I understood and learned, I believe, from what I saw of Captain Lawrence——

Q. (Interrupting.) I didn't ask you what you understood, learned, and believed.

A. Well, what I knew of his condition—that he wasn't in the proper condition at all times to do business—and I know of—I say I knew of transactions contemplated with him that I did hear—that he was upon the point of entering into some large transactions. I had a conversation with his wife about it; she didn't believe that he was in condition to——

Q. (Interrupting.) Now, Doctor, I don't want all that.

A. I knew that he wasn't in a condition to do it, and I went to

his banker and I says, "If transactions of any considerable magnitude or moment come up—checks—pass them on to be checked; they ought to be stopped; they will not stand the test; he is not in a condition to do business"—and I want to say that.

Q. Say what?

A. I wanted to say that to his lawyer and his banker in order that he might be protected in any large transaction of that kind, where he might enter into it not understand-ly.

Q. Now, then, Doctor, when was that?

A. To the best of my judgment, sir, it was either in 1886 or early in January, 1887. It must have been in 1886.

Q. In the latter part of 1886?

A. In the latter part of 1886. Those are the months that he was here—November and December—and I was in attendance upon him.

Q. You say when he left here in January, 1887, he went to Europe?

A. I suppose he did, sir.

Q. That is your opinion, he did?

A. Yes.

139 Q. Now answer my question, if you know of any steps being taken by anybody to put him under any guardianship or take his business out of his own control.

A. No; I do not.

Q. Well, Joab Lawrence was a very strong man when at himself, wasn't he, in mind and character?

A. He was originally, I think; yes, sir; regarded him as a strong man both physically and mentally.

Q. When did you first know him?

A. I think in 1871, sir, I first knew him. I think I made his acquaintance here then.

Q. How often after he returned in September, 1888, did you see him before he died?

A. From one to two or three or four times a day all the while.

Q. Every day?

A. Yes, sir; oh, there might have been an exception, a day perhaps pass over, something of that kind; but as a rule I saw him from one to two or three times a day.

Q. Where did you see him—wasn't he occasionally down at his office—wouldn't he go down there with an attendant—come downtown from his residence to his office?

A. I think he went into his office once. I saw him there once; he was helped over; on one occasion he walked, but then he was practically carried by his nurse. I saw him.

Q. How large a man was he in September, 1888, from the time he arrived here until the time he died—how much did he weigh?

A. Well, he had become very emaciated.

Q. How much would you say he would weigh?

A. Well, I judge not over 140 or 150; probably near that, at the time of his death.

140 Q. When he came back in September, 1888, how was it then?

A. Well, I should judge it was——

Q. (Interrupting.) From 140 to 150?

A. Yes; possibly a little more; he was a very large man; naturally had been.

Q. You say you saw him at his office, you remember, once or twice?

A. Once.

Q. Who officed with him?

A. Mr. Fox.

Q. Charlie Reed in his office with him?

A. Yes.

Q. Was he there?

A. I think Reed was there that day; yes, sir.

Q. Were you there that day yourself?

A. Yes, sir; I stepped in.

Q. How long were you there?

A. Perhaps five minutes—three minutes.

Q. Well, do you remember anything about a circumstance when Mr. Lawrence was in there of taking up some instrument, a barometer or something that belonged to some man, and looking at it and talking about it, explaining it, and telling whom it belonged to, and all, and that he wanted him to have it?

A. I have no knowledge of anything of that kind; I saw nothing of it.

Q. You were not in there when that occurred?

A. I didn't see anything of that kind, I say.

Q. I say, you were not in there when that occurred, if it did occur?

A. No, sir.

Q. You don't mean to say it didn't, do you?

A. Why, of course not; I say I saw nothing of the kind.

141 Q. Do you know who the house girl was of Mr. Lawrence here in Salt Lake during his last sickness after he arrived here in 1888—September, 1888?

A. The servant girls?

Q. Yes, sir.

A. I knew them both, but I don't know their names, either of them.

Q. Did you know one of them named Jennie Christensen?

A. I don't recall their names at all. I knew the two girls, used to see them very often, and one of them has been a patient of mine since, but the names I don't recall.

Q. You knew Joab Lawrence's wife well, did you?

A. Yes, sir.

Q. When did she die?

A. She died a few months since.

Q. About when? See if your books show the exact date.

A. Died January 8th.

Q. Wasn't it in March or April?

A. I will tell you, sir, exactly; April 3rd, I think.

Mr. JUDD: Gentlemen, do any of you know?
Mr. MARSHALL: 5th of March, 1890.
Mr. JUDD: Are you willing to adopt that date, Doctor—5th of March, 1890?
WITNESS: Yes, sir.

Q. 5th of March, was it?
A. 5th of March, in the morning.
Q. You find from examining your books that that was the correct date?
A. Yes, sir.
Q. How long had you known her?

Objected to as not cross-examination. Objection overruled and exception taken.

A. Well, I think she came here about 1872 or '3—1872, I think; I am not entirely clear.
142 Q. Well, when did she marry Mr. Lawrence?
A. I don't know, sir.

Objected to as not cross-examination.

Q. Do you know how long she was his wife here in this community?

Objected to as not cross-examination, irrelevant, and immaterial. (Argument.)
The COURT: If you wish to show that she was a person of sound mind up to the time of her death, you may show that.
Exception by defence.

Q. How was that, Doctor? Was she a person of sound mind and memory up to the time of her death—Mr. Lawrence's wife?
A. Up to her last sickness; yes, sir; I understand.
Q. You never knew of any mental defect in her, did you?
A. No; no mental defect. I knew she was suffering from nervous troubles.
Q. Well, any loss of mind or memory?
A. Oh, no, sir.
Q. I will ask you this question: If you think it is probable that Mr. Lawrence, in the mental condition in which you found him on his return from New York in September, 1888, could have remembered upon seeing a little instrument something like a barometer in his office whose it was; that it belonged to Mrs. Graham; that he went on to say it belonged to her, and that he wanted her to have it.
A. I wouldn't expect that to be the case.
Q. I ask you if you think he had mind and memory enough to do what I have recited to you substantially.
A. I don't think he was in condition to do it.
Q. You don't think he could do it?

143 A. No, sir; I should not expect so.
Q. You have heard he did do it, haven't you?

Objected to as hearsay.

Q. Don't you know that he did do that thing?
A. Why, no.
Q. Doctor, might one who was interested, who was producing upon Mr. Lawrence a condition that would create the impression that he was of unsound mind, suffering from dementia, dope him with opiates or narcotics or something of that kind at times when he was to be seen by others, and put him in that condition that he would produce that impression upon even a physician?
A. You ask me if that condition could be brought about?
Q. Yes, sir.
A. Oh, I think so; yes.
Q. And make him appear worse than he really was mentally?
A. Oh, I don't know anything about that.
Q. Sir?
A. It would bring about the condition that you speak of.

Redirect examination of Dr. J. F. HAMILTON by Mr. MARSHALL:

Q. The last question that counsel asked you was, whether by giving Captain Lawrence opiates on the occasions of physician's visits such condition could be brought about that a physician would take it for softening of the brain or dementia?
A. I said it would approximate or approach that condition to some extent.
Q. Could a physician be deceived for any great length of time, visiting him daily?
A. No, sir.
Q. What would you say as to Captain Lawrence's condition
144 being brought about by such a means?
A. I have no idea that it was a factor in the case, or ever had anything to do with it.

Mr. BROWN: I move to strike that answer out. That is an opinion upon whether anybody did do it or not.
Motion denied. Exception taken.

Q. You stated that during the fall of 1888 you saw Mr. Lawrence upon one occasion in his office in this city?
A. Yes, sir.
Q. Mr. Reed was present, I believe?
A. I think he was.
Q. And Mr. Fox?
A. And Mr. Fox.
Q. What was his mental condition upon that occasion?
A. I think it was complete dementia—almost complete.
Q. Was he capable, then, of co-ordinating ideas and expressing himself consecutively?

A. I don't think he was. I saw him that day at his house. I saw him every day before and every day afterward, and at no time did I consider from the time he come here that he was in a condition to talk understandingly; he was despondent, much of the time weeping, occasionally saying a little, rarely ever more than yes or no.

Q. Did he form any sentence of any length at that time?

A. He didn't do it in my presence, and I have no idea that he was in a condition to do so when I saw him.

Q. Did you try him for the purpose of testing his mind?

A. Oh, yes.

Q. I understood you to say that his memory was greatly impaired. What was the condition of his memory during the fall of 1888 to recollect past transactions?

A. Well, practically none—no recollection.

145 Mr. JUDD:

Q. You say you have no idea, that you don't believe that the mental condition you found him in here at Salt Lake was produced by doping with opiates or narcotics. You don't undertake to say what was done in New York, do you, when he was away from here?

A. I know nothing of that.

146 The following letters from John N. Whitney to Joab Lawrence, from John N. Whitney to William H. Wood, from William H. Wood to John N. Whitney were introduced in evidence, and it was admitted that they were written by persons purporting to sign the same, and received in due course of mail by the persons to whom directed.

Said letters are as follows:

EXHIBIT No. 50.

ONTARIO MINE,
PARK CITY, UTAH, *July* 14, 1887.

William H. Wood, Esq., San Francisco, Cal.

DEAR SIR: I still hold the certificate Lawrence made out and handed to me and you was also handed one similar at some time certifying that I was entitled to one-eighth interest in the real estate in Detroit and the $23,587.50 which the Eureka Company was indebted for.

I also claim $5,500 additional salary voucher which was also added to the mortgage of $43,587.50 which subsequently by compromise gave 30 per cent. interest in the existing mining Co., which interest has been paid $161,000 in dividends I so learned last spring from the company's books.

I claim under my certificate that Lawrence has been and is now trustee acting for my interest in the mine and real estate,
147 and I am going to soon bring suit for my claim or an accounting of the same. But I well know you was handed one exact- like mine, which I am prepared to so state.

The Eureka has again exposed ore which promises better dividends than ever before. My rightful interest in the dividends already paid to Lawrence are over $25,000.

If you think you can establish your interest and so desire to join the fight with me I would be glad to have you. Your suggestion several years ago to sue him I can now see ought to have been followed up.

Lawrence does not frequent Salt Lake much on account of health. He is liable to die at any time of softening brain. If I cannot get personal service soon shall do so by advertisement.

If I can get the case before court and jury I will win, as the public has Lawrence down pat.

Give the matter due consideration and write fully as soon as possible.

Yours, &c., J. N. WHITNEY.

Answ'd July 22, from Portland, Oregon. Will go in on contingent fee for one-third or one-half on what is collected. W. H. W.

This letter was in plaintiff's handwriting & was admitted to have been received by William H. Wood in due course of mail from its date and was introduced in evidence.

148 EXHIBIT No. 51.

(Letter-head of the Cullen hotel.)

SALT LAKE CITY, UTAH, *March* 1, 1888.

W. H. Wood, Esq., San Francisco, Cal.

DEAR SIR: Our attorney, J. G. Sutherland, thinks the proper place to bring suit against Joab Lawrence is New York city, it being where Lawrence resides. By so doing we can obtain an estoppel against his transfer of Eureka shares, the Mansion House property and any other property we may desire to include.

If suit be commenced here it will require service by publication, and no injunction can issue from here against Eureka stock or the continual payment of dividends to him, or prevent his transferring. If in case we obtain judgment then we would realize if we could find property standing in his name, whether living or dead.

We will have to conduct such suit with our own money in N. Y. as Mr. Sutherland says attorneys there would have to be given the case.

Mr. Sutherland offers to leave here between the 10th and 15th of this month and proceed to N. Y. and start the case in hands of proper attorneys if we will pay his personal expenses, being absent about three weeks; wants you or I to go with him. (How would it suit you to go with him.)

149 It was admitted that this letter was written by John N. Whitney, plaintiff, to Wm. H. Wood, & was received by the latter in due course of mail.

EXHIBIT 52.

SALT LAKE, SATURDAY, *March* 31*st*, 1888.

W. H. Wood, Esq., San Francisco, Cal:

Yours of March 28th just received. I have been here all the week waiting upon Sutherland, who leaves here with me this evening for N. Y. city, where we will be next Wednesday, stopping at the Hoffman house.

"You can telegraph me at Hoffman house Wednesday to Saturday if anything to say or suggest."

We go to make demand and get service upon Lawrence.

It will necessitate employing attorneys there and then forward testimony in depositions. You see I am not starting on the contingent plan. Let it be a winning or losing venture. I am going to make this break now and fight.

If you think you do not want to take such interest with me in the venture, you so telegraph me at Hoffman house, N. Y. Upon receipt of this, you better telegraph me anyway to either commence suit in your name when I commence my suit, else say you do not desire such suit. Such will be some authority. Sutherland
150 expenses is simply cost of trip there and back. Say two weeks. I shall endeavor to get attorneys of some reputation.

Fox who married Lawrence's daughter just returned. Had Chambers work with him. He reports Lawrence living on 59th St. Says L. walks out into the park some days two hours, looks better than last fall, &c. Don't want much to annoy him now. Keeps a bodyguard with him when out.

Yours, &c., J. N. WHITNEY.

This letter was introduced in evidence and it was admitted that it was written by pl'ff, J. N. Whitney, to W. H. Wood & rec'd by the latter in due course of mail.

EXHIBIT No. 53.

(Letter-head of Grand Pacific hotel.)

CHICAGO, *Apr.* 14, 1888.

W. H. Wood, Esq., San Francisco, Cal.

DEAR SIR: As I wrote to you from N. Y. I commenced suits for you and myself in the N. Y. supreme court against Lawrence.

It will take a few days to ascertain what move he will make. All of which I shall keep you fully advised. If we cannot obtain our rights by this course it is quite worth while to know the reason why. Our N. Y. attorneys talk very strongly in our favor. If L. is worth the claim and he has property available, etc.
151 Can't you ressurrect the old letters you received from L. where he wanted you to be at Provo at the trial of foreclosure of the mortgage, and any letters which he may have spoken of our mutual interest in the Detroit property, or the trust held for us by

him. Dig up what you can. We may soon have to make our depositions, when if we desire to you better come to Salt Lake where after talking we can work together for some issue.

It was admitted that this letter was written by John N. Whitney to W. H. Wood and was introduced in evidence.

EXHIBIT No. 54.

(Letter-head of Beekman & Cashin Mercantile Co.)

EVANSTON, WYO., *April* 24, 1888.

William H. Wood, Esq., San Francisco.

DEAR SIR: I am just in receipt of yours of 19th.

I am quite of the opinion that Lawrence has not transferred either the Eureka stock or the Detroit property. Our attorneys in N. Y. start the case in the N. Y. supreme court with seven judges, and are asking for injunction on both real estate and Eureka shares, and for receiver to be appointed for proceeds of same, &c., with
152 order that Lawrence making accounting of what has been received. Lawrence must soon make answer, or if he should come forward with physician's certificate, setting forth that the state of his health does not permit making answer, then the case might take such turn with the court that the court might appoint a commission to determine the exact situation of Lawrence's—relative to his sanity or ability to make answer. I am waiting for developments now. I received your letter and two telegrams addressed me at Hoffman house. Shall keep you fully posted of all that I may learn from time to time; ought to learn something soon.

Judge Sutherland, who went to N. Y. with me, seems to feel certain that Lawrence will never be well enough to attend such a case. Again says his history is not one of fighting in courts, and really expects soon to see something come out shaping an overture for a settlement. I would like such a turn in affairs, but my faith is more in having a big fight than any overtures towards any settlement. Lawrence's nearest friends may, after being more fully posted as to the magnitude and nature of the case, desire some settlement rather than have Lawrence bothered much more, when they are trying to prolong life.

I think you had better call at Haggin's office and see Cham-
153 bers, who is there now, or leave your card. He will take pleasure in coming to see you, as he often inquires about you.

I rely greatly upon Mr. Chambers' influence with Lawrence's Salt Lake attorneys, Bennett & Dixon, to work them to advise settlement. He believing from what he has seen and heard that all that is being claimed is actually just and right.

Yours, &c., J. N. WHITNEY.

This letter was introduced in evidence, and it was admitted that it was written by pl'ff, J. N. Whitney, to Wm. H. Wood and received by the latter in due course of mail.

154 Strike out all of the page immediately preceding Exhibit 1, said page being unnumbered, and insert the following:

The following exhibits were introduced in evidence:

At the end of Exhibit 1 insert:

This letter was written by plaintiff, John N. Whitney, and was produced and introduced in evidence.

At the end of Exhibit 3, marked Exhibits 10 and 9 for identification, insert:

These two exhibits were admitted to be in the handwriting of plaintiff, and were found among the papers of Joab Lawrence at the time of his death unsigned, and plaintiff testified that he sent them by mail to Joab Lawrence about two or three months or a year or two after there date; that he never received any response from Lawrence respecting the same, and never after spoke to Lawrence about them; that he sent them to be signed by Lawrence in order that he might have written evidence of his interest in the mortgage and the Mansion House property, and that his intention in writing them was to cover thereby all his interest, and that he could not explain why the salary account was not included.

At the end of Exhibit 6 insert:

Plaintiff testified that at the time he testified, as set out above in Exhibit 6, he was a resident of Evanston, Wyoming; that he appeared at Provo, Utah, upon the trial of The Bullion Beck and Champion Mining Company against The Eureka Hill Mining Company as a witness against the Eureka Hill Mining Company; that he came from Wyoming to Provo, Utah, where the case was tried, voluntarily and for the purpose of testifying against the Eureka Hill Mining Company; that he appeared at said

155 trial and testified in November, 1885; that he knew at that time that the ore bodies in dispute in that action were of great value, and that the contention of the Bullion Beck and Champion Mining Company was that there were two veins, while the contention of the Eureka Hill Mining Company was that there was but one vein.

Strike out Exhibit 18.

After Exhibit 20 add:

Exhibit 20 was shown to have been mailed Sept. 27, 1875; and also insert:

The plaintiff, in pursuance of notice, produced at the trial of this action the following letter, which was admitted to be in the handwriting of W. H. Wood, and to have been received by the plaintiff in the due course of mail from the time of its date. This letter was introduced in evidence and is as follows:

SAN FRANCISCO, *March 1st*, 1880.

Mr. John N. Whitney.

DEAR SIR: Yours came to hand some time since, and fully noted. What course is it best to take with Lawrence to bring him to a settlement? Will the law work in this case this late day? Our claim may be good upon the Eureka in case he should wish to sell, as I have his letter saying I was interested ⅛ in the mortgage and in

the Detroit property. I think it is time something should be done, and done promptly and fearlessly, and a full exposure made, if necessary. I am satisfied the mine cannot be sold if our claim is put in the right shape. I think any one can see it, and think we can claim our portion of his receipts in law. Drop me a line at once, as I now intend to start for the East and home in about two weeks and shall stop at Salt Lake City; if it may be best, find out what he intends to do—I mean Lawrence. No other way
156 but to take the bull by the horns. I fear him not. I have closed in one today, and he gave down his milk and came to time.

Yours in haste, WM. H. WOOD.

At the end of plaintiff's exhibits insert: The deposition of EDWARD C. SEGUIN, a witness in behalf of defendants, taken in pursuance of a stipulation in this action, was introduced without objection and is as follows:

157 Q. State your name, occupation, and residence.

A. Edward C. Seguin; physician; 28 Aborn street, Providence, R. I.

Q. How long have you been a physician?

A. 26 years.

Q. Have you practiced your profession in this State?

A. Yes; I have practiced my profession in New York State.

Q. What branch?

A. I have been a specialist in nervous and mental diseases.

Q. How long have you practiced in that branch?

A. 14 years.

Q. Of what college are you a graduate?

A. I am a graduate of the College of Physicians and Surgeons of New York.

Q. Did you know Captain Joab Lawrence?

A. He was a patient of mine during the whole of 1888.

Q. In March and April, 1888, what was his condition?

A. He was during that part of 1888 suffering from partial paralysis of both sides of the body. His speech was impaired in the way that we designate aphasic disturbance. He was also unable to read from a condition of the brain which is known as alexia. His memory was very much impaired and extremely fitful; his judgment and power of associating ideas were extremely feeble. He was subject to attacks of emotional disturbance, laughter or tears, upon the slightest provocation, such as the simple question, "How are you?" or "Good morning." He was disposed to drowsiness during the day, and in general terms he showed all the evidence of dementia.

He also presented indications of disease of the heart and kid-
158 neys and also of the arteries throughout the body.

Q. Was he able to carry on a conversation?

A. He was not with me.

Q. Was he able to express his thoughts clearly and intelligently?

A. Not with me.

Q. Do you imply by that he might with other people?

A. I was present when he tried to tell his wife something, but he could not complete the sentence.

Q. When would you say that his brain was in the condition when he could express his thoughts intelligently?

A. I could not say.

Q. Please look at the paper purporting to contain the testimony of John N. Whitney with Mr. Lawrence on the 6th day of April, 1888. State what you will say regarding Mr. Lawrence's ability to conduct such a conversation.

(The counsel for the plaintiff objects to the question as immaterial and incompetent.)

A. Would say that during the winter and spring Captain Lawrence could not make such complete sentences in his conversation with me. He would begin a sentence, but very soon break off.

Q. You remember seeing him on or about the 6th of April?

A. I think I did. One of my visits was on the third of April. That was the day of my interview. I have two extended entries taken near that time. I have entries dated the 23rd of March and the 17th of April; could not say that I saw him on the 6th of April, but I saw him two or three times a week during all that time.

Q. What do you say as to his ability on the 6th of April as to holding such a conversation?

A. In my opinion, he could not have held it.

159 Q. Was he able to make these remarks on the 6th of April, 1888?

A. I should say not.

(Plaintiff's counsel objects to the question as immaterial and incompetent.)

Q. Does that answer apply to all the remarks which he is alleged to have made on that occasion?

A. No; there are some simple replies which he was capable of making.

Q. Which ones?

A. "I am lots better." "Mr. Whitney, do you think I look pretty well?" He never said as much as that to me.

Q. What do you say as to the remark, "Last fall I could not raise my right arm at all; now I can get it clear up to my head"?

A. I doubt that he could have said that.

Q. What do you say as to the remark, "Smoke all the time, Mr. Whitney; I don't see as it hurts me any"?

A. I don't think he could have said the full sentence.

Q. What do you say as to this: "Mr. Whitney, I am anxious to go to Salt Lake; I am anxious to be in the boom."

A. I doubt if he could say the whole sentence.

Q. Mr. Whitney says that Mr. Lawrence made the following remarks: "Mr. Whitney, about the Mansion House property, the subject which you were talking about before lunch, I will state that the Mansion House property remains the same as it did when we ac-

quired it of Captain Ward, and so far as the mining company's interest is concerned out to Salt Lake there I hardly know myself what shape it is in, but I am coming out to Utah just as soon as I am able to come, when we will get together and see how this
160 matter does stand." What do you think as to that?

A. I am sure he could not have said such a sentence.

Q. Then, I understand you to say he was unable to carry on such a conversation?

A. He was.

Cross-examination by Mr. ALEXANDER:

Q. Have you any entry in your minutes of the case on the day of April 6th, 1888?

A. No.

Q. What is the nearest note which you have preceding that day?

A. 23rd of March.

Q. What is the nearest note after April 6th?

A. April 17th.

Q. For how long a time was he under your charge?

A. Three years.

Q. During that time you took note of every important change of condition, did you not?

A. Yes.

Q. Have you any independent, distinct recollection of his precise condition as it agreed with or differed from the dates preceding and following that date of his condition on the 6th or the times when you saw him just before and just after the 6th?

A. I could only say that his condition during the spring and summer of that year, 1888, was remarkably uniform from day to day.

Q. During that period did the patient understand what was said to him—that is, did he appreciate the meaning of words?

A. Usually he did if simply presented to him.

Q. Could he assent or dissent from statements made?

A. Yes.

Q. Could he by expressions indicate his approval of defects of speech?

A. No; his attempts at reply were cut short by an emo-
161 tional attack.

Q. Though unable to say long sentences, could he not have understood conversation—carried on the train of thought?

A. There was no evidence that he could.

Q. Could he not have conveyed consecutive ideas by broken phrases, such as a child can do?

A. He never did with me.

Q. Are you able to say that, in your opinion, on the 6th of April it was impossible for him to do so?

A. Yes.

Q. Is it not possible that the visit of Mr. Whitney on that day

may have so roused him as to enable him to perform feats of expression hitherto unusual?

A. I do not think so.

Q. Have you not seen cases where a diseased mental condition was variable?

A. Yes.

Q. Do not all such cases vary greatly to their environment from time to time?

A. Not in a case like Captain Lawrence's, where there were multiple bilateral and extensive lesions in the brain.

Q. Does the condition of speech, motor aphasia and alexia, necessarily imply a loss of memory of events and transactions?

A. Not necessarily.

Q. A man, therefore, may have such loss of speech without dementia?

A. Yes, sir.

Q. May a man present a lack of emotional control without loss of memory?

A. Yes.

Q. May a man lose his memory of single words without real incapacity to judge of the import of acts?

A. Yes.

Q. It is true, is it not, that there was a broken system of communication between the patient and his wife and nurse—that is,
162 he did succeed in communicating his wants to some extent?

A. Yes.

Q. Do I understand you to testify that in April, 1888, the man had no judgment?

A. That is my opinion.

Q. Please define judgment.

A. I should define judgment as the power of comparing ideas and reaching conclusions from such comparisons.

Q. Would not these efforts to communicate with his wife and nurse indicate an exercise of judgment?

A. Yes; in a simple form.

Q. So there were some exercises of judgment which his mind in April was able to make?

A. Yes.

Q. The same is true of his power of associating ideas.

A. Only the most elementary ideas.

Q. Is it within your power to lay down any distinction between elementary and compound ideas which a patient is capable of associating?

A. Yes. The simple ideas to which I refer were such as related to his present condition or his immediate wants. The complex ideas are such as require an exercise of memory and the correct association of events and facts in point of time. Such ideas he was never successful in correlating for me.

Q. Can you say that at that time he was incapable of recognizing an old and intimate friend?

A. No.

Q. Assuming that he had had for months before in his possession important property of that friend, can you say that he was at that time, on meeting that friend, incapable of intelligently assenting to the statement that he held such property?

A. No.

163 Q. Could he not at that time upon being asked whether he would restore such property intelligently indicate by word or sign that he would?

A. I doubt it.

Q. You are not willing to positively say that he could not?

A. I am not.

Redirect examination by Mr. MILLER:

Q. What do you mean by the assent referred to in the last two questions?

A. I mean the simple answer yes or no.

Q. Do you mean anything as meaning that he comprehended the questions and designed to make an intelligent answer to them?

A. I wish to answer that in a lengthy way. In Captains Lawrence's condition any but the simplest questions presented in the plainest manner produced confusion, and in the second place he was not always correct even in answering yes or no. He frequently misused these two words in his relation with me.

Q. So that if he seemed to assent to a proposition, would that be conclusive evidence to you that he understood it?

A. No.

Q. And what would this confusion arise from?

A. Generally from the breaks in his memory, and also from emotional distur-ances which recurred constantly during an interval to my knowledge.

Q. Then, when you answered Mr. Alexander's question that Mr. Lawrence might have assented to certain questions or propositions, do you mean thereby to affirm that Captain Lawrence understood them?

A. Not necessarily. Everything he said required cor-

164 roboration, even as regards his stools or whether he had eaten.

Q. So that he was mistaken even in regard to the simple things?

A. Frequently.

Q. And was that true with him at or about April 6th, 1888?

A. Yes.

Q. I will ask you to define the limits of Captain Lawrence's power of forming judgment and co-ordinating ideas on April 6th, 1888.

Q. He was then in an advanced stage of organic dementia, and his recollection or judgment of any matter was of the most simple and childish sort and unreliable as well.

Q. Then was he able to comprehend the statements alleged to have been made by Whitney to him and to answer them intelligently?

A. I think not.

(Signed) E. C. SEGUIN, M. D.

Examination by the undersigned taken by his stenographer, reduced to writing, and by the witness subscribed and affirmed to this 14th day of June, 1890.

(Signed) WILLIAM C. DAVIS.
Commissioner.
E. C. SEGUIN, M. D.

165 The deposition of ADOLPHUS A. WALTERS, a witness in behalf of defendants, taken in pursuance of a stipulation in this action, was introduced in evidence without objection & is as follows, to wit:

My name is Adolphus A. Walters; aged 40 years; reside at present at Swampscott, State of Massachusetts; occupation, nurse.

I knew Captain Joab Lawrence between January, 1888, and December, 1888. During the early part of that year and up to about June 15th, 1888, he lived at the Navarro flats, in the city of New York. After that time he lived at Long Branch, Saybrook, Conn., and Salt Lake City. I had charge of him as nurse. His physician was Doctor Edward C. Seguin, at that time of New York city and now of Providence, R. I. During Captain Lawrence's residence in the city of New York I saw him constantly, except when I went out to get my meals. I remember his condition during the month of April, 1888. He behaved more like a child than as a grown person. You could do with him as you liked. He was in such a condition that you could not rely upon anything that he told you. If he were asked a question, such as what kind of a night he passed, and after having a good night he would tell me "poor," meaning he had had a poor night, when I knew he had passed a good night. When I would correct him about his mistake he would get angry and excited. When I would ask him to get dressed he would be very obstinate and get into another state of excitement. As far as conversation was concerned he was in a bad state; he could not make his wants known unless repeatedly helped by putting
166 words in his mouth, and even then he could not form a sentence himself; a correct sentence. Most of the time he would say yes *he would say yes* when he should have said no, or *vice versa.* His mind was very cloudy; he could not read the newspapers; he could hardly express his wants, wants of nature, &c. I was in the habit of finding out his wants by questioning him. He sometimes said he wanted one thing when he wanted another; he was not able to keep up a conversation upon any subject; he would utter one or two words and then get excited, stamping his feet upon the floor and pounding upon the arm of his chair with his hand. You could not get him interested in any subject. I would commence to talk with him; he would listen for a moment and then look out of the window; he was not able to understand or talk business; he seemed to take no interest in it nor in any other subject. He did not have the free use of his limbs, except on one side, of which he had little use. He seemed to sit there like a piece of iron. His power of locomotion was very slight. His left arm hurt him so much that he could simply lift the hand of that arm to a point about three or

four inches from his chin. The right arm was entirely helpless. When he walked I had to sustain him and give him my whole support. If I did not he would have fallen down. This was so all the time when he went to his meals and when he tried to pass from one chair to another. He could not stand alone; he ate at the table and was fed by a waitress; he could not feed himself; he waited for the food to be placed in his mouth. Captain Lawrence had false upper teeth and would sometimes lose them out of
167 his mouth. Sometimes when the food was not placed in his mouth to suit him he would blow the food, teeth and all, upon the table. As to his power of speech, he could not articulate more than one or two words. He had a good deal of impediment in his speech; he could not make himself understood when he wanted anything; we had to ask him.

Q. Mr. Whitney, in giving testimony on one occasion, says that on the 6th of April, 1888, he called at Captain Lawrence's residence in the Navarro flats. Did you see him there?

A. Yes, sir.

Q. Were you present?

A. I was in the adjoining room, and could see the Captain and Mr. Whitney together and hear their conversation. Most of the conversation was between Mr. Whitney and Mrs. Lawrence. The Captain had very little to say. He just sat there. I heard him once in a while mumble something. I could not understand what he did say. I was near enough to hear all the conversation.

Q. Mr. Whitney says that Captain Lawrence remarked, "I am lots better, Mr. Whitney. Do you think I look pretty well? Last fall I could not raise my right arm at all; now I can get it clear up to my head." Did he make any of those remarks?

A. He did not make those remarks nor anything like them. He could not have made them nor anything like them. The sentences would have been too long for him to retain in his memory.

Q. "Smoke all the time, Mr. Whitney. I don't see that it hurts me any." Did he say that?

A. He did not, nor anything like it. He might have shaken his head if he had been asked whether he smoked, but he could not have formed the sentence; it is too long.

168 Q. "Mr. Whitney, I am anxious to go to Salt Lake. I want to be in the boom." Did he say that?

A. He did not, and he could not have said it.

Q. "Mr. Whitney, about the Mansion House property, the subject which you were talking about before lunch, I will state the Mansion House property remains the same as it did when we acquired it of Captain Ward, and, so far as the mining company's interest is concerned out to Salt Lake there, I hardly know myself what shape it is in, but I am coming to Utah just as soon as I am able to come, when we will get together and see how this matter does stand." Did he say that?

A. He did not say that nor anything like it. It would have been impossible.

Q. Did he make any statements or suggestions to Mr. Whitney whatever?

A. He did not. The conversation was carried on wholly between Mrs. Lawrence and Mr. Whitney. Captain Lawrence occasionally uttered an unintelligible murmur, but that was all. I have been a nurse for twenty years, and have been accustomed to all kinds of patients. I was educated as a nurse at the Long Island College hospital and St. Luke's hospital, New York.

Cross-examination by Mr. ALEXANDER:

Q. State all that you remember of the conversation on the 6th of April, 1888, at Captain Lawrence's apartments.

A. Mr. Whitney came in and shook hands with Mrs. Lawrence and the Captain. He said he had just come on from Salt Lake, and wanted to pay them a visit. He asked what they had been doing, how they had been spending the winter, and how they were go-
169 ing to spend the summer. He asked about how long the Captain had been sick, whether he was improving or going backward. I did not hear him mention any business matter to either the Captain or Mrs. Lawrence.

Mr. Whitney asked Mrs. Lawrence when they were going back to Salt Lake, or whether they were going to Europe to spend the summer. Mrs. Lawrence replied that she was uncertain where, she had not made up her mind. She asked Mr. Whitney to stay to lunch and he said he would with pleasure. I do not know what was said at the table during luncheon, as I was not there. When I came back from my lunch Mr. Whitney was ready to go. He had risen from his chair and had his overcoat upon his arm. He said to Mrs. Lawrence, "You will hear from me again." I was present during all the conversation up to the time of their going to lunch. I have told all that I remember of the occasion that preceded lunch. The patient continued to grow worse during the period while he was under my charge. His condition during the month of April, 1888, was not variable, but continuous. I returned about 15 minutes after they were through their lunch. They were generally about an hour at lunch. There was no time during the period while the patient was under my charge when he was capable of uttering complete sentences. He never did utter a complete sentence.

(Signed) ADOLPHUS A. WALTERS.

Examination by the undersigned taken and reduced to writing by him and by the witness subscribed and sworn to this 13th day of June, 1890.

WILLIAM C. DAVIS,
Commissioner.

ADOLPHUS A. WALTERS.

170 WEDNESDAY A. M., *June* 25, 1890.

JOHN N. WHITNEY, being sworn as a witness in behalf of the defendants as to the competency of William H. Wood to testify as a witness on certain matters, testified as follows:

Direct examination by Mr. DICKSON:

Q. (Showing witness Exhibit 2.) Examine that paper; you recognize that, don't you?

A. Yes, sir.

Q. That is a contract that was entered into between you and Mr. Wood?

A. At that time.

Q. I will ask you if you recognize the handwriting of the signature to that (Exhibit 1).

A. That is written and signed by William H. Wood.

Q. Was it received by you in course of mail?

A. It was received by him when I was in the city of New York on the 5th day of April, 1888.

Q. Received on the 5th?

A. Yes, sir; I think, as near as——

Q. It is dated the third?

A. No; it was some time after that.

Q. It was in due course of mail, I suppose?

A. Yes, sir.

Q. (Showing witness paper.) Did you receive that telegram?

A. That telegram was received by me on the 5th day of April at the Hoffman house, in the city of New York, 1888.

Q. Shortly before you received the letter?

A. Yes, sir.

Mr. DICKSON: I offer this telegram.

Mr. BROWN: No objection.

(Mr. Dickson reads said telegram and the same was marked Exhibit 3, third district court, June 25, 1890. Whitney *vs.* Fox. F. E. McGurrin, stenographer.)

Mr. BROWN: These are all papers that we furnished you
171 under the notice?

Mr. DICKSON: Yes.

Q. Have you ever made any other contract, verbal or written, with Mr. Wood than this one——

A. No, sir.

Q. To which your attention was called. Never had any discussion looking to a change of the terms of the contract at all?

A. No, sir.

Q. You are still operating under that contract?

Mr. BROWN: Well, that would be a conclusion.

Q. Well, is that your understanding of that?

Mr. BROWN: I object to his understanding of that.

Q. Has there ever been any alteration of that agreement between you?

Mr. BROWN: He has already answered that question. I object to reiteration.

The COURT: Let him answer.

A. That agreement refers——

Q. (Interrupting.) Just answer my question. Has there ever been any alteration in that agreement between you and Mr. Wood?

A. No alteration unless it may be in the bringing of separate suits here, which would have no reference to that contract.

Q. Was there ever any suggestion made by you to Mr. Wood or by Mr. Wood to you that the abatement of that suit affected this agreement in any way?

Mr. BROWN: I object to that as immaterial what their opinion would be as to the abatement of that suit.

The COURT: He asks if there was an agreement.

172 Q. I ask you if there was ever any suggestion made by you to Mr. Wood that this agreement was at all affected or would be at all affected by the abatement of that suit. Look at me and not Mr. Brown and answer the question.

Mr. BROWN: Well, you can look at whom you please. There is no direction here to look at Brother Dickson unless you wish to.

Mr. DICKSON: I request you to look at me. Do you understand the question?

A. Yes, sir.

Mr. BROWN: There is no reason why, because a man has a right to cross-examine a witness that he has to use his eyes and scold him.

The COURT: No.

Mr. BROWN: It is disallowable in this case.

Q. Have you made any suggestion to Mr. Wood that the effect of this contract between you and him would be at all changed by the abatement of that suit in New York?

A. No, sir.

Q. Has he ever made any such suggestion to you?

A. No, sir.

Mr. DICKSON: That is all.

JOHN N. WHITNEY, being recalled in behalf of plaintiff as to competency of William H. Wood, testified as follows:

Direct examination by Mr. BROWN:

Q. You were asked as to this agreement in writing which was made between you and Wood and if there had been any change in it. Has there been any agreement whatsoever with regard to these suits between you and Wood?

A. No, sir.

Q. Unless that one is such an agreement?

A. Unless the bringing of these suits may change the
173 character and the meaning of that contract, but there has been no talk between us or communication in regard to that matter.

Q. There has been no agreement on the subject of these suits that are now pending either way?

A. No, sir.

Q. Is there any agreement that if you win you are to give him half of what you get?

A. If I win on my suit I expect to keep the money. If Mr. Wood wins on his suit he will probably keep his money, as I understand it.

Q. Have you any agreement by which he shall give you any part of it?

A. No, sir.

Q. You say probably keep his money—that is, you don't expect him to spend it on you?

A. No, sir.

Q. Have you any agreement by which he is to give you any of it?

A. No agreement except that one which Mr. Dickson handed me.

Mr. JUDD: He means with reference to these suits.

A. None whatever.

Mr. BROWN: If you get beaten and Wood wins, have you any agreement by which he is to give you half——

Mr. DICKSON: We object to that.

The COURT: I think it is proper for him to state whether there is any other agreement than the one.

Mr. BROWN: We will have no words about it. I won't press it. If you don't want the question answered you need not have it.

The COURT: I think it is proper for him to answer whether he had any other agreement than the one.

WITNESS: None other than the one Mr. Dickson showed me.

The COURT: That is the only agreement he has had with
174 Wood concerning the pooling of their expenses and the proceeds of this case?

Mr. JUDD: Yes, sir; that is what he says.

Thereupon court took a recess until 2 o'clock p. m. Friday afternoon, June 27th, 1890.

JOHN N. WHITNEY, being sworn as a witness in his own behalf, testified as follows:

Direct examination by Mr. BROWN:

Q. Mr. Whitney, did you own any stock in the Eureka Mining Company?

A. In the Eureka Mining Company of Utah?

Q. Yes, sir.

A. I did.

Q. Was that a part of its title, the words "of Utah"?

A. Yes, sir.

Q. We have spoken of it here heretofore as the Eureka Mining Company. I suppose you understand that to be the same thing?

A. Yes, sir.

Q. The real title was the Eureka Mining Company of Utah, was it?

A. Yes, sir.

Q. Did you hold any official position in regard to it?

A. I was vice-president of that company.

Q. Did you as such vice-president know what the books of the company consisted of?

A. Yes; I think I did.

Q. I have got 3 or 4 here, or rather Mr. Bennett has brought in 3 or 4 here, which I suppose are books of the company.

Mr. BENNETT: All that I know of.

Q. I show you a book which was marked in a former ex-
175 amination of yours. You are the plaintiff here, are you?

A. Yes, sir.

Q. As Exhibit V 22 in your deposition.

Mr. DICKSON: Was that in the Salt Lake deposition?

Mr. JUDD: Yes.

Q. I will ask you what that book is.

A. That was a book that was kept for the minutes of the various meetings of the Eureka Mining Company of Utah.

Mr. BROWN: As such I offer it in evidence. You don't care to see it, I suppose?

Mr. BENNETT: Isn't that the copy?

Mr. BROWN: I don't know if it is the copy.

Mr. BENNETT: Well, if it is, it is an exact copy. I had it made. Put the original in and have the copy filed.

Mr. JUDD: We want the original.

Q. Look that over and be sure about it.

A. This is the same as the other, only different handwriting.

Q. Did you as vice-president have to sign your name occasionally to it?

A. No, sir; only when I was asked to copy some minutes into this book.

Q. So that there is no signature of yours anywhere in that that would identify it?

A. That page right there; that is all my writing on that page.

Q. I don't care anything about your writing. I mean your signature?

A. That is my signature; I wrote that.

Mr. BROWN: Page 59. Now, I offer this book, not with special reference to that page, by any means, but with special reference to pages 43, 44, 45, 46, and 47.

176 Mr. BENNETT: What is that, the meeting of November 9th?

Mr. BROWN: Yes; the meeting of November 9th and November 4th, which begins at page 38. I offer those; they have all

been read out of a printed record in connection with another thing, and can be referred to in the argument.

Mr. BENNETT: I would like to call attention of the court to the presents November 4th.

The COURT: It may be admitted.

(The portions referred to were read by Mr. Brown and said book marked Exhibit A. H., third district court, June 27th, 1890. Whitney *vs.* Fox. F. E. McGurrin, stenographer.)

Q. I show you another book, also marked Exhibit V 22. I will ask you what that book was, if it was one of the books of the Eureka Mining Company?

A. Yes, sir.

Q. What is it?

A. It is one of the books of the old Eureka Mining Company of Utah, and is what we term the day book or day journal.

Mr. BROWN: I offer that in evidence. There is a number of pages that I wish to refer to with special reference to the item of $20,000 and $31,000. I don't know that I can just now point out the pages. Any other references that might be in it we want, so we will offer the book.

The COURT: Let it be admitted.

(Said book was marked Exhibit A. I., third district court, June 27th, 1890. Whitney *vs.* Fox. E. E. McGurrin, stenographer.)

Q. I next show you a book purporting to be a ledger. Look at that and state if you know what it is. I will ask you if that
177 is one of the books of the original Eureka Mining Company of Utah.

A. Yes, sir; it is the ledger of the original Eureka Mining Company of Utah.

Mr. BROWN: I offer that book in evidence in the same way, especially the account of Wells, Fargo & Co. in reference to the $20,000 and the $31,000, together with such entries as may be desired on either side to refer to.

The COURT: Let it be admitted.

(Said book marked Exhibit A. J., third district court, June 27th, 1890. Whitney *vs.* Fox. F. E. McGurrin, stenographer.)

Q. I next show you a book already introduced in evidence, Exhibit B; please look over that and tell us what that book is, if you know anything about it.

A. That is the old book of the same company, that we called a stock journal.

Q. Stock journal?

A. Stock ledger.

Q. Was it used as such by the company and the company's officers in its time?

A. Yes, sir.

Q. That is the book that Judge Bennett testified to when the case first opened. You were in the court-room, were you not?

A. I don't remember of seeing Mr. Bennett on the stand.

Mr. BENNETT: That is the same book.

Q. That was used by the company, was it?

A. Yes, sir.

Q. Was it the sole book of the date therein mentioned, used as the stock ledger?

A. Yes, sir.

Q. As such you recognize it?

A. Yes, sir.

Q. Mr. Whitney, you knew Joab Lawrence in his lifetime, I suppose?

A. Yes, sir.

178 Q. You know his handwriting?

A. Well, I thought I did. I have seen it lots of times.

Q. Officed some with him, did you?

A. Yes, sir.

Q. You seen the declaration that has been offered in evidence here?

A. Yes, sir.

Q. When did you first see that document? (Showing witness Exhibit A.)

A. I saw that for the first time just before dinner, 5 o'clock dinner, on the 9th day of November, 1872. It was handed to me by Joab Lawrence.

Mr. DICKSON: I object to that. It is not responsive. I ask that it be stricken out.

Mr. BROWN: You have no right to strike it out on that ground. I adopt it as our own. You may move to strike it out on another ground.

Mr. DICKSON: We move to strike it out, that remark, that it was handed to him at that time by Joab Lawrence, on the ground that he is not competent to testify about that, Joab Lawrence being dead and he being a party to this action against the representatives of Joab Lawrence, and that being a matter, too, which must have — equally within the knowledge of himself and the deceased.

The COURT: Well, I suppose that it stands on the same footing as the other testimony. It will be received subject to the objection.

Mr. BROWN: I think it stands on a new footing. It stands on a new footing as the California case.

The COURT: I mean it would stand on the same footing
179 as his other evidence. His deposition has been offered here and other evidence of that kind.

Mr. DICKSON: I want to call the court's attention to the fact that a very grave injustice may be done *is* by making a *pro forma* ruling on a matter such as this. This, now, is independent testimony. If he is permitted to testify in chief, not knowing whether his testimony is to be permitted to stand as part of the record or no, we are driven to cross-examination as a matter of self-protection, and yet the authorities are very clear that, where a witness' incompetency appears, any objection upon the ground of incompetency is forever waived by the party cross-examining.

Mr. JUDD: Oh, no; not where you have reserved your objection.

Mr. DICKSON: Yes; by examining we waive the right. If your honor has any doubt about that I will bring in some authorities. That is why we would like a ruling on this one way or the other.

The COURT: I don't remember that as being the ruling. If it is, of course it will be necessary to make a final ruling on it.

Mr. BROWN: I just want to state my reasons for offering it. My reason for offering this is this: It is not exactly on the same ground as the deposition; it is rather the converse of it—it is the correlative of it.

The COURT: I don't mean in all respects it is the same. What I mean to say is that he is testifying now about a transaction between him and the deceased occurring in his lifetime.

Mr. BROWN: Equally within his knowledge.

The COURT: Yes; so that in that respect it is similar.

180 Mr. BROWN: If the statute applies to cases of trust, then we offer his deposition, and, so far as this question is concerned, his deposition alone, on the ground that his deposition was taken in the lifetime of Joab Lawrence, and as such would survive although the cases might be abated, but we would have a right to it on the grounds argued the other day. If this class falls within the statute, then we insist upon the deposition, but as the court may, in finally ruling upon t-at question, *but as* take*n* the testimony in hand merely, we take the converse also, and that is that this class of cases is not within the statute—that is what the California cases say—and that then, for fear that the deposition itself might not be proper because here was a live witness whom we called, we put the man upon the stand himself; I don't propose to go into it at great length, but I do propose to prove by the witness and to ask him questions tending to prove the salient points in this case. The real matters in issue are fully within the 67th California. I do not present this as argument, but so that we may understand each other.

The COURT: Well, my reason for not wanting to make a final ruling on it the other day was the very reason that has transpired since. I inquired whether there had been any cases found construing that statute, and I did not know but what there might be before the case would be finally determined, and for that reason I wanted to have all the time there would be to find what had been the ruling and whether there had been any exceptional cases decided, and hence preferred to let the depositions be received subject to the objection, so as to give time to counsel as well as myself

181 to thoroughly look up that question before I made a final ruling on it, and, if it was agreeable to counsel, I would prefer now, if the party is not prejudiced by cross-examination, the testimony would be received in the same way, so when it comes to argument counsel may find additional cases and the other side may find additional cases, and, if neither side does, perhaps the court — find some. At any rate, I would like to examine that question to some extent. You see, the California court makes a case which comes up in trust an exception to the ruling, and have placed it to some

extent upon the wording of their statute, which is quite similar to ours.

Mr. JUDD: Verbally it is the same.

The COURT: With the exception of the last paragraph. The last paragraph in ours is not in the California statute.

Mr. JUDD: They don't quote it all.

The COURT: They quote that section, and the last clause of our statute is not in theirs as quoted. You may look at our statute here. I think you will find there identical word for word, except the Utah statute has added to it the one paragraph which the other does not have. As Mr. Brown suggests, there is this question: whether a deposition is receivable where the witness is in court at the time it is offered, whether or not the evidence wouldn't be taken then instead of the deposition. Of course there is that; but unless the cross-examination of the party by the defendants would prejudice their rights, I would prefer, as far as that is concerned, to defer it. Of course counsel can take their own course. I would
182 prefer that this evidence be taken than the cross-examination be had without waiving any right thereby, so as to leave this question to be determined, because it is a very important part of the case as to whether or not the testimony of this plaintiff is admissible.

Mr. JUDD: It is the case.

The COURT: Yes; you may say it is the case.

Mr. BENNETT: The deposition of the witness taken in New York has been admitted tentatively. Now, why the witness?

The COURT: Supposing the witness should not be examined, the question might be whether or not when he is in the court his deposition is admissible.

Mr. BENNETT: That objection we made in the beginning.

Mr. BROWN: No; I don't think you did.

Mr. BENNETT: So that if the present objection is overruled the present objection should go out because he is here.

The COURT: That might be an additional reason.

Mr. BENNETT: I simply submit that to the court.

Mr. JUDD: It is with a view of meeting these contingencies that we now offer him.

Mr. BENNETT: He was not in danger of death just then. There can be no contingency. The depositions have been read.

Mr. JUDD: But the court might rule that out; might rule that the witness himself is competent.

Mr. BENNETT: I think now is the time to choose.

Mr. DICKSON: We think that this question should be determined now, if your honor please, because, as I suggested, in no other way can justice be certainly assured to the defendants in this
183 action. If the witness is permitted to go on and tell his story in chief, and then we move to strike it out, and upon argument your honor should then strike it out, the story without any cross-examination, by which we hope to shake very materially the redirect examination of the witness, his direct testimony, without cross-examination, would have been before your honor. How-

ever you might try to guard against it, it must necessarily make some impression and leave some impression on the human mind. I care not whether the case be tried before a judge or by a jury, how we may try to guard against impressions received in that way, they are there, and there is danger of their having effect. (Argues.)

The COURT: I would have supposed that where a party objects to a witness, not simply to certain portions of the testimony, but where he objects to a witness that he is not a competent witness, that if objection is made to the witness giving any testimony or to his giving a particular class of testimony, and that objection was overruled, it is my impression that the party then waive- nothing by cross-examination.

Mr. DICKSON: You see, if it would be ruled absolutely that would be so, but your honor rules it *pro forma*, subject to a motion to strike it out. We don't want to be driven to that and have his story here without cross-examination. And then if we go on and cross-examine and then move to strike it out we — got to move to strike out our own cross-examination. Your honor has suggested that he is not incompetent for all purposes. We have to make these objections from point to point as we go on.

Mr. BROWN: It would be a very singular point to practice
184 that a party would waive one right by merely exercising another, to both of which he is clearly entitled. If this testimony is incompetent, as they allege, then counsel have the clear right and would object or move to strike out, providing they have not waived it in any other way; notwithstanding that objection is overruled, they have the clear right to cross-examine. Now, their exercising the right to cross-examine is not inconsistent with the right to strike out; hence I see no waiver. Of course, if no objection is made when the testimony goes in, or too broad a one, it would be a different thing entirely. These parties objecting when the testimony comes in, they don't waive their right. We don't care when it is determined. We are simply taking the contingency. Here is a dilemma in which we are placed, and we don't propose to be left to the accident. If the deposition is going out under the ruling of the court we want to offer this testimony.

The COURT: There is this reason why it seems to me that they should offer this witness: While his testimony cannot be any more competent than a deposition would be, nor the deposition any more competent than his testimony, if either were standing alone, but they offer his deposition, which has been received for the time being, but among other objections they may urge to the final receiving of this deposition is the fact that the witness was in court at the time the depositions were received; therefore the depositions were received. In such a case they ought to offer their client as a witness.

Mr. BENNETT: Yes; but then we have their depositions.
185 The COURT: Well, that *they* may be an additional reason why the deposition should not be received, because, in addition to having the witness in the court, they have him testify that

might be, and my impression would be that it would be a good reason why the deposition should not be received in such a case.

Mr. MARSHALL: They are protected by offering the witness.

The COURT: What I want to avoid is passing upon the question now, because the whole case nearly rests——

Mr. JUDD: We have to make our record for another court, if it should go up there, and we have a right to spread our testimony on this record.

The COURT: And I prefer until the final argument if possibly it might be deferred and have his testimony received in this sort of a case, because, as I suggested the other day, I hadn't looked at the points recently; since then this California case has been found, and there may be other cases, and if there is any way to avoid making a final ruling on it now I prefer to do it.

Mr. BROWN: I merely offer him to save that point. I am willing the deposition should stand alone if the gentlemen are.

Mr. DICKSON: If we could anticipate what your honor's ruling would be when we made a motion to strike out at the end of his direct examination—if that motion would be denied and we could go on and cross-examine, I wouldn't care.

Mr. JUDD: Well, you can. We agree so far as that is con-
186 cerned that you may take your exception at any time, and that it may serve you.

Mr. DICKSON: I wouldn't like to take it upon a stipulation. I had rather take it upon a ruling by the court. When he closes his direct examination and we move to strike it out that it is denied not on our request, of course.

The COURT: What I was going to suggest was, it could be provided by stipulation that if his direct examination was received subject to the objection you might have the right to cross-examine without thereby waiving any right or prejudicing your right to move at the close of the cross-examination.

Mr. BENNETT: Will counsel permit that to be entered?

Mr. JUDD: Yes, sir; yes, sir, as a stipulation in the case.

Mr. MARSHALL: I don't see how you can move to strike out the very questions we have asked him, if germain.

The COURT: They are simply directed to the direct evidence. They are simply explanations of it, and would necessarily fall with the direct examination.

Mr. MARSHALL: I take it not. I take it if we ask the witness a question and he answers materially to it——

Mr. BROWN: You want some way by which the cross can stand and the direct go out.

Mr. MARSHALL: No; I want the cross to go out with it.

Mr. BROWN: If the direct is stricken your cross goes wherever the direct goes.

The COURT: If you want to go outside of the direct examination and make the party your own witness——

187 Mr. MARSHALL: I take it you cannot object that evidence is incompetent when you ask for it yourself. You cannot

object when you ask a question that it is incompetent and demand an answer.

The COURT: I take it that when a witness has testified in chief and the other party cross-examines, that is only further explanation of what he testified about; that is all it amounts to, and if his direct examination be stricken out that evidence goes, to-. Now, I have not examined that case, and I would have a difficulty about deciding, but I must say at present I don't believe it is good law to hold that a party when he objects to evidence when it is being offered cannot at the close of the testimony of the witness move to strike it out. He certainly cannot do any more than that, and, even if he cross-examines, that that is any waiver. I never understood that to be the rule.

Mr. JUDD: This holds that if he moves to strike it out after the main examination he gets the benefit of it.

Mr. DICKSON: Yes; the only danger is that the motion might be granted then.

The COURT: I think if his cross-examination—suppose it is overruled—if he goes on and cross-examines——

Mr. DICKSON: Yes; then he is all right.

Mr. BROWN: I think that case turns upon the peculiar phraseology which the court gave when the testimony came in. He said, I will rec-ive it with your leave, and if it turns out to be incompetent you may move to strike it out. Now, instead of signifying in any way their objection that they considered it incompetent, they allowed the court to believe that it was all right and went
188 ahead. Certainly it wouldn't apply here, because my brothers here say and have said that they don't want to waive it by cross-examining. The court has said that and Mr. Judd has said so.

The COURT: Well, it is natural that they should offer this witness, because their deposition may not be admissible. Even if I should hold that it is, the next court it goes to might hold otherwise. It is natural that they should offer this testimony. Now, if it is objected *to* as we go along that the witness is not competent to testify to certain facts and the objection is made to it, the motion made to strike it out, still they feel the appellate court might think differently. Of course counsel must make their own case. If a ruling is insisted upon, it must be made. I would rather it would not be. I would much prefer to have a little time to look that question up. It is held there by the California case that cases of trust are an exception. Now, it may be possible that other courts have held that it is *now* an exception. Of course it has been ruled on a great many times; it has come up very often in the courts of this country, and there ought to be any quantity of decisions on it. I think every State has just such a statute or substantially like it. Well, if no stipulation is made, I suppose the next thing is——

Mr. DICKSON: We will take a ruling. I think that will be safer than the stipulation. Take the ruling as it goes along.

Mr. JUDD: On each question.

Mr. DICKSON: As each matter is objected to.

Mr. JUDD: That is better. Still you can have the stipulation if you want it.

189 Mr. DICKSON: I am opposed to stipulations in the heat of a trial. I move to strike out the statement of the witness that it was handed to him by Joab Lawrence, on the ground that I have already stated.

The COURT: That is the declaration of trust.

Mr. DICKSON: That is the declaration of trust. If it is admitted we will renew our motion to strike it out at the close.

The COURT: I think for the present I will receive it, subject to your objection. Yours is a motion.

Mr. BROWN: It is the same thing; the motion goes in the shape of an objection.

The COURT: I was going to say it would be received subject to the objection until the close of the testimony.

Mr. DICKSON: We note an exception.

Mr. BROWN: The answer was that it was handed to him by Joab Lawrence.

Q. Who was present at that time?
A. William H. Wood.
Q. Joab Lawrence?
A. And Joab Lawrence.
Q. John N. Whitney?
A. John N. Whitney.
Q. Did you see that document written?
A. Yes, sir.
Q. By whom was it written?
A. Joab Lawrence.
Q. Did he write any other document at the same time?

Mr. DICKSON: We object. Well, he may answer that question yes or no.

A. Yes.
Q. What was it?

Mr. DICKSON: We object on the ground——

Mr. BROWN: I don't mean now the contents, of course.

Mr. DICKSON: Our objection is, I suppose it might be un-

190 derstood, to save so much time.

Mr. BROWN: You mean that it is equally within his knowledge.

Mr. DICKSON: Yes.

Mr. BROWN: You need not make it at all until we get to the close of the case.

Mr. DICKSON: The record might show this: that all testimony given by the witness to any fact or matter which is equally within the knowledge of himself and the deceased, Joab Lawrence, will be received subject to the objection on the part of the defendant.

Mr. BROWN: You need not stop to itemize it out every word; it breaks us up, and takes ten times the time.

The COURT: Is that objection to be deemed as *to* applying to all

evidence that may be elicited from the witness concerning any transaction between him and the deceased?

Mr. DICKSON: That it would be incompetent under that statute.

Mr. BENNETT: Equally within the knowledge of both parties.

The COURT: Subject to your motion to strike out at the close of the testimony.

A. It was a declaration similar to the one that I have in my hand that was handed to me.

Q. In whose favor?

A. In favor of William H. Wood.

Q. I show the witness Exhibit A. F. Is it your judgment that that is the one?

A. Yes, sir.

Q. What had been said immediately previous by Mr. Lawrence, if anything, with regard to it? Just state the transaction there that day.

A. Of November 9th?

Q. Yes; with regard to this between you there. I don't
191 mean any transaction by the board, but as to you three.

A. There had been talk from November 4th up to November 9th about the $23,587.50 being placed in shape of a mortgage and $20,000 to be added to it, which was voted to us as salaries, $5,500 to myself and the same amount to Mr. Wood and $9,000 to Joab Lawrence. Do you want me to explain how that happened to be $5,500 or $9,000?

Q. Not now. I will come to that in a minute. Go on about this paper. What was said about that?

A. Mr. Wood was displaying his wishes for something to show his interest, and I subsequently learned——

Q. (Interrupting.) No matter about that, just tell what was said there at that time.

A. Well, he wanted something to show his interest, and I don't think that I ever said very much to Mr. Lawrence about any declaration at all.

Q. No matter what you didn't say; just state what was said, if anything; and, if not, then what was done.

A. Mr. Lawrence was working over these two declarations probably an hour or two or two hours to get them in shape right to suit himself, and he handed me mine first.

Q. Did he say anything?

A. Yes, sir; he said, "There is what your interest is in the money loaned to the company and the salaries added thereto;" didn't make any minute of the salaries, but he entered it and said, "There is your interest in the loan," and then he passed over to Mr. Wood and handed his to him, and I looked mine over and I saw this was
the $23,587.50 that I knew as what Mr. Lawrence had told
192 me he had loaned to the company, and had told me he had loaned to the company, and Mr. Lawrence had then left the office and went to dinner at the Townsend house, and I went over to Mr. Wood's desk and sat down opposite of him there, and——

Q. (Interrupting.) Lawrence had gone out, then, had he?

A. Yes, sir.

Q. Well, after Lawrence left I don't want. Now, I will go back and ask you what was the original consideration for which Mr. Lawrence gave you this—what had you given him, if anything?

A. Well, he had previously disposed of 250 shares of my capital stock in the company to one Eber Ward, of Detroit——

Q. Had he disposed of any shares of Wood's?

A. Yes, sir; a like number, and delivered them.

Q. When had he taken those shares? You say he had disposed of them. He must have had them in his possession to do it. When did he take them?

A. We delivered them to him in November, 1871, as near as I now remember.

Q. November, 1871. Was he going anywhere at that time?

A. No, sir.

Q. What purpose were they delivered to him for, if any was expressed between you and Lawrence—what was said on the subject?

A. Well, what brought about this consolidation?

Q. Yes, sir; this pooling. Why did you deliver them to him?

A. Well, about that time I came up from the mine—the evening before—and Mr. Lawrence the next morning says to me, he says, "Mr. Whitney, now, we have gone into this venture together," and he says, "Now, the stock at the present time is getting of some value, and either one of us could sell out, and we have had
193 some—Mr. Wood and I have had some talk, thinking you might sell your shares and leave us here to run thing- ourselves," and I says, "Mr. Lawrence, I went clear to Chicago, invited you to come out here and examine the property and take hold and put up the working capital. You have seen fit to do it, and we have always felt a little blue and ever since we got associated in the mine about the outcome of this, and although there may be a price for the shares now and a man might sell some, to show that I wouldn't sell and do anything and leave you here—step down and out—I will just put my shares right in your hands now, and if I have any trade or inclination to dispose of my shares I have got to come and ask you for them before I can deliver them, and I am at the mine all the time anyway and you can go and trade these shares off, and whenever you trade any shares my proportion will be in proportion to what you sell when we make a trade—as we own the mine." I guess that is the expression—I owned only a small portion of the mine, the mining venture, compared with what Mr. Lawrence owned; I proposed to stay with it, whether she sunk or swum.

Q. That is what you told him?

A. Yes, sir.

Q. Did Mr. Wood say anything at that time?

A. After I had made this talk with Mr. Lawrence right before Mr. Wood he then says, "Mr. Lawrence, if you have any fears of me I will put mine in the same—in envelope, and hand them to you as well."

Q. Well, what was done after that?

A. What he done? He put his shares in, what he owned at that time, and handed them to Mr. Lawrence, and I handed mine
194 to Mr. Lawrence, and put — in an envelope and marked on the back whose shares they were.

Q. After that did Mr. Lawrence go away with a view of disposing of any of the stock?

A. No; not that fall. There were some Englishmen here, having some consultations with Mr. Lawrence; I think Mr. Colbath was called in to make some report on the company.

Q. Don't go too much into detail on it, just answer the question. Did he go away with a view of disposing of it?

A. Yes; he went away the following spring on a call of the telegram from London, England; took the shares with him.

Q. Spring of 1872?

A. Yes, sir.

Q. When did he return from England—from Europe?

A. He returned in August of that year.

Q. August, 1872?

A. Yes, sir.

Q. I think I assume that he went to Europe—it was to Europe he started for?

A. Yes.

Q. What report did he make as to the disposition of stock when he returned in August, 1872, to you and Wood?

A. He reported that he had stopped in Detroit at the instigation of a telegram that I had sent him to New York to stop there on his way home, and he met various parties there, and there was a man—can I go on and state any of these things?

Q. Go on and state what he reported.

A. He reported that he had a talk and conversation with Mr. Lee and Mr. Mahew and Mr. Griffith, and he was also introduced, he said, to Captain Ward, and he told him that he didn't desire to sell—
195 told Mr. Lee and Mr. May and Mr. Griffith that he didn't desire to sell any portion of the Eureka mine or shares at that time, wanted to borrow some money. Mr. Lee said he thought he could borrow some money for him up to his bank at Ypsilanti, and stated that he did go out there and borrow $25,000 or got notes, put up his own notes for $25,000, and that it was endorsed by these other parties and him, and that he had brought back $23,587.50, deposited in the bank at Wells, Fargo & Company.

Q. As the result of how big a loan?

A. $25,000.

Q. Did he say he put up any collateral?

A. He also put up $25,000 shares of the Eureka Mining Company shares at par value.

Q. 25,000 shares?

A. 25 thousand dollars' worth at par value, counting the shares at par value, a hundred dollars.

Q. 250 shares?

A. Yes, sir; as collateral.

Q. Do you know as a matter of fact whether the company did receive the credit for that $23,000 odd dollars?

A. I have since seen it credited on the books of the company.

Q. In that way you know it?

A. Yes, sir.

Q. After that state whether or not Joab Lawrence made another trip with a view of disposing of stock.

A. He did.

Q. When did he start?

A. I think about the 12th, along the middle of the month of October.

Q. Where for?

A. Started for Detroit.

Q. Did you receive letters from him while he was gone?

A. Mr. Wood received letters from him. I might have received one—but I wouldn't be positive myself—stating what he was
196 doing and what his talk had been to parties there.

Mr. DICKSON: When did you say he left the second time?

A. Middle of October. I think it is the middle of October, 20th or 21st, along there somewheres, as near as my memory serves me now; no, September. I correct myself, Mr. Dickson.

Mr. BROWN (showing paper to witness): The point I was going to ask you is this: Is that the handwriting of Mr. Lawrence?

A. Yes, sir.

Q. That is Exhibit H, dated Russel house, October 9th, Wednesday noon. Did you see that letter that was shown you?

A. Yes, sir.

Q. On the receipt of it in due course of mail?

A. Yes, sir.

Q. That was received while you was gone by Wood?

A. Yes, sir.

Q. Well, no matter, the letter will show for itself. After that do you remember when Mr. Lawrence returned or about when?

A. October 19th, as I now remember.

Q. It was some time in October?

A. Yes, sir.

Q. When he returned did he make any report to you as to what he had accomplished?

A. Yes, sir; that evening I went up to Ogden and met him when the train came in.

Q. Was Wood there at Ogden too?

A. No, sir.

Q. I don't care what was said while you and he were alone, but when you three were together did he make any report to you jointly?

A. When he returned that evening we all three were in the office of the Eureka Mining Company of Utah.

Q. What did he say?

A. And he related that he had made a trade with Heber
197 E. Ward; that he had delivered—he spoke, his language was—he said, "I made a trade," he says. "I don't know

how good it is, but I have got a lot of chips and whetstones"—that is the expression he used—"for the plunder that was received in the trade;" and, I think, 1,200 shares of Silver Evelet and, I think, 1,300 shares of rolling-mill stock—Wyandotte Rolling Mill stock—and he had received a house—a hotel—and three lots on the corner of Atwater and Griswold streets. We don't know anything about the streets.

Q. Was any name given to that?

A. Called the Mansion house. I can't say whether he made a diagram that evening or subsequently, and he had received also 160 acres of land back in some county west of Detroit, and also Captain Ward's note for $30,000, which he had discounted a- Mr. Ward's bank, drawing 8 per cent. interest.

Q. Did he report what became of the proceeds of the $30,000 note?

A. He stated that he had used $10,000 to take up one of those notes at the Ypsilanti bank and the rest he brought to Salt Lake.

Q. Did he ever make any division of these chips and whetstones?

A. No, sir.

Q. Did he at any time on and prior to November 9th?

A. Yes, sir.

Q. In fact, you may tell the transaction from this October—the date of his return in October until November 9th—whatever the history of the matter was so fas — pertains to the division of this matter.

A. You ask for some conversation that occurred that evening?

Q. If there was any further and particularly. You have
198 not yet told us how much stock he traded for these things—how much stock of yours and how much stock of Wood's.

Q. I don't think he had told us that evening; that conversation has slipped my mind now.

Q. He must have told you at some time.

A. Oh, he said that telegram that I sent to have you pass a check in the company's book when I was in Detroit on November 7th was for the purpose of voting ourselves a salary. He says, "I had guaranteed to Mr. Ward that the indebtedness"—he asked me if there was any indebtedness on the mine, and he told him that he couldn't tell what it was—how much it was; but I guaranteed that it would not exceed $50,000. That was the substance of the conversation in regard to that matter.

Q. Go on.

A. That seems to be about the end of that.

Q. I asked you before to go on and state any other conversation in which he stated how many shares of stock he traded, how many of yours, how many of his, and how many of Wood's.

A. He told us that night, or explained, he says, "We delivered 250 shares of your stock and 250 shares of Wood's stock to Captain Ward."

Q. And how many of his own?

A. 1,700; about 2,000 shares in all.

Q. Was anything said on that first night whether you were satisfied or dissatisfied to accept his trade or not?

A. No, sir.

Q. Nothing said?

A. No, sir.

Mr. BENNETT: How many shares from Mr. Lawrence?

Mr. DICKSON: 250 each *each;* 1,750 shares that belonged
199 to him as we calculated; he had been buying shares in other people's name.

Mr. DICKSON: What is that?

A. What number of shares standing in Joab Lawrence'- name delivered I cannot state.

Mr. BENNETT: I understood you to say 1,700.

A. Well, 1,700.

Mr. BROWN: How many shares did he deliver in all to Ward?

A. 2,000. It would be 1,500 of Mr. Lawrence's 250 shares. A certificate to each of us to that amount—250 shares each. I was thinking of his subscription.

Q. What was said at any time as to whether you would stand by and accept this trade or not?

Mr. DICKSON: Mr. Brown, I wish you would not lead him.

A. That was subsequent to that evening, Mr. Brown.

Q. Well, what was said?

A. Well, he said—he says—we were all talking together, the three parties—and he says, "Gentlemen"—he says—"this Ward trade that I have made," he says, "I delivered one certificate of each of your- of 250 shares each, and now," he says, "this may be a good trade or a bad trade, and," he says, "if you want any of it you can have as much of it as you want, or you can have it all, or you need not have any of it if you don't want it." I says to Captain Lawrence myself—says I, "Inasmuch as you have distributed 250 shares of my stock in this trade, if it should be a bad trade I think I ought to assume that much, and if it is ever so good a trade you would not want me to assume much more, and I think that would be fair between the parties here to let it be. If it — a bad trade you have made, why we ought—after authorizing you to make it any
200 trade that you would make we would be satisfied with it; we ought to accept; if it is a total loss, the proportion as you have delivered of our shares;" and that was agreed upon; then, after we had fully decided that was the way it should be settled, he then mentioned about this loan he had made in August for the company. He didn't want $23,000 loaned out there to that company; he didn't consider that a very good loan, and he says, "Gentlemen, you will have to stand in on that in the same proportion that you have with this Ward trade." We didn't think the Eureka Mining Company was in——

Q. Never mind what you thought; go on with what was said.

A. And we told him that would be satisfactory to us. I told him I would do that, and Wood fell in with it.

Q. Well, was there any talk prior to the time this talk was made?

A. We decided to do that—take that interest in the mortgage or in the loan that he had made and in the chips and whetstones that he had obtained of Captain E. E. Ward—and he says then, "I have got $2,000 remaining out of the money received from the discount of that note of Mr. Ward's," and he distributed to me on the night of—between the 4th and 9th; I won't be just positive as to the date—he gave me his check for $250 on his own personal account at the bank. Whether he paid Mr. Wood $250 I am not able to tell.

Q. In the meantime, between then and November 9th, had any action been taken in regard to the services?

A. I was at the mine at the time—from the time that Mr. Lawrence returned from Detroit. I think he and I went down, and I think he wanted to see something about the progress of the mill that was being built—give some directions—and I think I
201 went with him; went to Eureka and staied about the mine and returned on the evening of the 3rd of November, and the trustees' meeting had been called for the 4th, which met in the afternoon, and the talk about salaries was made on the 4th and Mr. Lawrence, if I remember right, wrote out the vouchers for us himself and I signed mine and Mr. Wood signed his, and that afternoon they were presented to the directors' meeting and voted and ordered paid. In a conversation that morning, before he wrote those vouchers, he says, "How much salary do you think I ought to have, Mr. Whitney?" "Well," says I, "Mr. Lawrence, you ought to have a good deal more than Mr. Wood and myself." Says I, "You have been to the front all the time, and whenever any one asked any questions you were here to answer them. I have done, perhaps, more laborious work, being at the mine, than you have, but you ought to have more salary than I," and he made some figures on a piece of paper and marks himself down $9,000 and each of us $5,500 and says, "How will that do?" he says. "Well," I says, "I am satisfied with that"—$5,500. I considered Mr. Lawrence was a good deal smar-er man than I ever hoped to be.

Mr. DICKSON: Never mind that.

Q. Did you tell him that?

A. No; I didn't tell him that.

Q. Just tell what was said.

Mr. DICKSON: It is probably true enough.

WITNESS: Yes, sir; it is very true. He was smarter than any of us.

Mr. BROWN: After that salary account, as you call it, was voted, did you know of this check being drawn, No. 287?

A. That was drawn on the morning of November 7th.

Q. You knew of its being drawn?

202 A. That was filled out and taken to the bank.

Mr. BENNETT: What date does it bear?

A. October 7th, 1872.

Mr. BROWN: You knew of its being dated back, did you?

A. Yes, sir.

Q. Was there any talk by Mr. Lawrence as to why that was done?

A. Yes, sir; that talk was made on the evening of his return in explaining why he sent that telegram.

Q. When the check was drawn, when it came to be finally drawn on the 7th, as you say, was there anything said by him then as to its being dated back?

A. No, sir.

Q. You saw him write it, you say?

A. I saw him at the desk writing it.

Q. What became of the check after it was drawn?

A. After he had filled it out he got up and held it up in his hand, the same as you are holding it now, and says, "There is the check for our salaries; I am going to the bank with it." He left the office and was gone perhaps long enough to go over to the bank and talk awhile over there, and came back.

Q. Did he ever pay you the $5,500 alluded to?

A. No, sir.

Q. Did you ever receive it from anybody?

A. No, sir.

Q. Do you know whether the whole $20,000 that was voted for you and him and Wood was included in the mortgage or not that was subsequently given?

Mr. DICKSON: That is pretty leading.

Mr. BROWN: I will change it.

Q. Do you know whether the $20,000 was included with the other twenty-three thousand in the whole indebtedness?

203 Mr. DICKSON: That is leading.

A. It was included——

Q. (Interrupting.) Just answer the question, whether you know it or not.

A. Yes, sir.

Q. You may state what you know in regard to it being put in with the other; what you know on that subject.

A. I know by the resolution that was offered by him at the meeting of, I think it is, November 9th, 1872. I think that is the meeting at which the resolution was offered, expressing that he had owned——

Mr. DICKSON (interrupting): That expresses itself.

Mr. BROWN: I want to know what he knows about it being included, of course, in a sense, that may call for this.

Mr. DICKSON: Well, go ahead.

A. I think the resolution was written up by Mr. Thomas Marshall.

Q. No matter who wrote it; tell what you know about it being included.

A. It was then offered at that meeting and read, as including the $23,587.50 loaned by him, and also the $20,000 loaned by him.

Q. That is the way the resolution reads?

A. Yes, sir.

Q. What I want to get at is the salary of $20,000.

A. That is the $20,000 salary.

Q. Was there any other loan made by him to the company than that $20,000?

A. Yes, sir; there was $23,587.50.

Q. Any other loan of $20,000 even?

A. No, sir; not that I ever heard of.

Q. After this mortgage had been voted—resolution of December 9th—how long did you remain on intimate terms with Joab Lawrence?

204 A. The mortgage had been voted?

Q. After that, how long did you remain on intimate terms?

A. After the meeting of November 9th?

Q. Yes.

A. Well, I think I have been pretty intimate with Joab Lawrence whenever I met him up to the time of meeting him in New York, and was then friendly.

Q. For the next three or four years—say from 1872 to 1876 and '7—how frequently did you receive letters from him?

A. From 1872, you mean?

Q. Yes.

A. From 1872 on?

Q. Yes; say the next three or four years.

A. Well, sometimes every day for three or four months at a time; when I was in Canada, perhaps one or two a week, averaged along; might be a week passing and there wouldn't be any; but we *was* communicating right along.

Q. A large series of letters have been put in evidence here?

A. Yes, sir.

Q. Did you see these letters that I showed Mr. Reade when he was on the stand?

A. I was here part of the time when Mr. Reade was on the stand; the latter part of his testimony.

Q. I would like to have you testify whether these letters which I am now showing you are part of the correspondence between you and Mr. Lawrence, and whether they are in his handwriting. I have already shown you that one of October 9th; I next show you Exhibit G.

A. This is a letter that I received from Joab Lawrence; that is his handwriting.

Q. Exhibit W.

A. That is all Joab Lawrence's—postal card to Mr. Wood.

205 Q. Exhibit K?

A. That is from Joab Lawrence to myself.

Q. And part of that correspondence, is it?

A. Yes, sir.

(Showing paper to witness.) Is that a letter received from him in London before that transaction, Exhibit E?

A. Yes, sir; this is a letter written by Captain Lawrence from London, England.

Q. To you?

A. To me.

Q. His handwriting?
A. And it evidently would be sent to Salt Lake.
Q. His handwriting?
A. Yes, sir.
Q. Part of the correspondence that you received from him, eh?
A. Yes, sir.
Q. Exhibit L?
A. This is a letter from Mr. Lawrence to Mr. Wood, written by him.
Q. Is that his handwriting?
A. Yes, sir.
Q. Exhibit R. Is that a letter received from him?
A. Yes, sir.
Q. His handwriting?
A. Yes, sir; 1875.
Q. Exhibit M. What do you say to that?
A. That is the same.
Q. Exhibit O?
A. This is a letter written to Whitney, myself, from Joab Lawrence.
Q. Exhibit P?
A. This is a letter written by Joab Lawrence from New York to myself.
Q. Exhibit V?
A. This is a letter from Joab Lawrence to William H. Wood, 1875.
Q. His handwriting?
A. Yes, sir.
Q. Exhibit Q?
A. This is a letter from Captain Lawrence to Whitney, myself.
206 Q. Exhibit X?
A. This is a letter from Hofman house, New York, written by Joab Lawrence to—it don't say who it is to, but that is his writing.
Q. Well, could you tell by looking at it whether it is to you or somebody else?
A. Yes, sir; it is intended for me and is sent to me.
Q. Exhibit N?
A. This is a letter from Detroit to Whitney, March, 1875.
Q. Joab Lawrence's handwriting?
A. Yes, sir.
Q. Exhibit Y?
A. That is Joab Lawrence's handwriting.
Q. Part of that correspondence?
A. Yes, sir; that is the letter that I received when I was in Canada.
Q. Exhibit Z?
A. This is another one received when I was over in Canada and written by Joab Lawrence.
Q. Exhibit I?
A. This is a letter written by Joab Lawrence to myself.

Q. Exhibit J?

A. This is a letter written by Joab Lawrence to myself.

Q. Exhibit F. Whose handwriting is that address on the envelope?

A. That is written by Captain Lawrence to William H. Wood when he was in England. This is a letter written to William H. Wood by Joab Lawrence.

Q. I now show you a letter, Exhibit A D, and ask you if that is in his handwriting.

A. Yes, sir.

Q. Exhibit A F?

A. That is in Captain Joab Lawrence's handwriting.

Q. Exhibit T?

A. That is in Captain Joab Lawrence's handwriting.

207 Q. I see that is a letter dated at Fair Haven. I think I showed you another one addressed at Fair Haven. I would like to know, if you can tell from your correspondence with him, about when he went to Fair Haven and how long he remained there.

A. He went there in the early part of the summer, built him a summer residence there, and left there in the fall of the year.

Mr. MARSHALL: What year?

A. 1875. I gain that from my correspondence, however—my knowledge.

Mr. BROWN: I show you Exhibit A E. Is that his handwriting, also?

A. Yes, sir.

Q. Has Mr. Lawrence ever accounted to you in any way for your one-eighth in that $23,587.50?

A. No, sir.

Q. Or for the result of it in the stock?

A. No, sir.

Q. Or for any of the dividends of the stock of the Eureka Hill Mining Company?

A. No, sir.

Mr. BROWN: You may examine.

Mr. DICKSON: Do you mean to say your direct examination is concluded?

Mr. BROWN: I think so. I may want to ask him about the Fair Haven letter.

Mr. DICKSON: If you undertake not to ask him any more questions we don't care to examine him.

Mr. JUDD: We have said to you our examination-in-chief is concluded, except that.

Mr. DICKSON: All right, if you stand by that.

Mr. BROWN: There is another matter that I think is legitimate that I thought would be within the scope of the cross-examination, and if you are not going to ask him about it I believe I will.

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Mr. DICKSON: I say if you drop him here we would not ask him anything.

Mr. BROWN: I will ask him about another matter.

Q. Two papers have been produced by you that I wish to show to you, bearing date October and November 9th, Mr. Whitney. I show you two documents which were shown to you, I think, on a cross-examination in New York. You saw them at that time, did you?

A. Yes, sir.

Q. In whose handwriting are those two documents?

A. They are in my handwriting.

Q. How did you come to write those?

A. The declaration that he gave me on November 9th, 1872, consolidated the real estate in the city of Detroit, Michigan, and the money loaned to the Eureka Mining Company of Utah. I wanted to segregate the real estate and the mining interests, and so I wrote two papers, one referring to each, and sent to him, directed to the Sherman house, Chicago.

Q. I see you provide for a little different amount. You ask there in that paper for one-eighth of $25,000. In the declaration of trust which Lawrence gave you he provides for an eighth of twenty-three thousand and a fraction.

A. Yes.

Q. State if that difference had anything to do with it.

A. $3,125 would be one-eighth of $25,000.

Q. Well, had that anything to do with your reason for drawing another?

A. After comparing mine with Wood that evening I found his was $25,000 and mine was for $23,587.50, loaned to the
209 company, and knowing that my interest was the same as his to a cent, and having inserted in my declaration, which is observable on the face of it, I had inserted what his paper said in pencil, and I was figuring all the time on $25,000 as the actual amount of money that he had of ours.

Q. Do you remember the occasion of the compromise of the foreclosure suit of Joab Lawrence against the Eureka Mining Company and the Eureka Hill Mining Company?

A. Yes, sir.

Q. Were you here in the city at that time?

A. I can't say whether I was at the time it was fully completed.

Q. Were you here during the negotiations that led up to it?

A. Yes, sir.

Q. Were you in consultation with Mr. Lawrence during that period?

A. Yes, sir.

Q. How long a time were you talking with him on that subject—that is, I mean during how long a period were these negotiations conducted?

A. Two or three hours.

Q. You don't understand my question; I don't mean how long

was any particular conversation when it was closed, but from the time that you and Lawrence first began to talk about settlement until it was finally consummated, how long a period elapsed?

A. Two or three weeks.

Q. Was anything said by Mr. Lawrence or by you in his presence or between you as to why he should compromise?

A. Yes, sir.

Q. Anything particularly on the subject of the $20,000 salary? If so, state what he said.

A. He stated to me and Mr. Wood, who had a like interest
210 with me, the same interest I had, that—his language was, "This mortgage that we hold, we had better compromise rather than to fight it." It was then in the foreclosure suit. He says, "It is better for us to compromise than to carry on this litigation," and he says, "I think that we had better take twenty per cent. if we can't do no better." I replied to Mr. Lawrence that I thought we better take the whole property; that I thought the mortgage would take the whole; better fight it right through. He remarked, "Now, don't go too fast, Mr. Whitney;" he says, "They may know more about that mortgage—that $20,000 that has been inserted in the mortgage—than you think they do," and he says, "If they get onto anything it won't wash at all," and he says, "I had rather have half a loaf than no loaf at all."

Q. Well, anything particular about the salary—the $20,000?

A. Yes; spoke about the $20,000.

The COURT: Who was it made the statement you just now repeated?

A. Joab Lawrence.

Mr. BROWN: Had he said anything to you previously as to the salary? I don't now mean as to the amount, but as to his opinion about it or that part of the mortgage.

A. Previous to that conversation?

Q. Yes.

A. Well, Mr. Wood and I was in his room in this city, at the Townsend house, and he commenced talking about this mortgage, which was then in the courts foreclosure proceedings, and stated what I have said.

Q. I know, but did he ever say anything to you as to whether the salaries could be enforced or not in his judgment?

211 A. Well, we all of us——

Q. (Interrupting.) Just what he said or what was said in his presence; I don't care for your opinion.

A. I don't know whether I ever heard him say; if I did I disremember whether he had; it was general talk with us, you know, together, that—we all felt a little delicate about the salary being there; whether it would stand a legal test or not.

Q. You say you all felt so? What was said by you or the substance of what was said indicating that feeling of delicacy?

A. I couldn't repeat whether we had much conversation at all.

Q. Well, was it talked over; was it mentioned?

A. Yes; we had some talk during that—a short time after the

mortgage was authorized to be drawn. The mortgage wasn't drawn and completed until the following January, I think, or February.

Q. Well, after it, when the foreclosure was on, was there ever anything said on this subject of your feeling of delicacy?

A. Well, he commenced the foreclosure in August, I think, of 1874, and I came back here; might have commenced it earlier than that—a month earlier—and I came back here a month or six weeks later than he returned, and I can't say whether he commenced foreclosure before I left or not, and I can't say that we had much conversation; he just simply said he had started a foreclosure on that mortgage.

Q. Well, pending the discussion and negotiation of settlement, was anything said on that subject about this delicacy of yourself with regard to collecting $20,000?

212 A. Well, he said what I related, that it wouldn't stand the test if they got onto the facts of how it was inserted—how it happened to be in the mortgage.

Q. Mr. Whitney, did you ever receive any declaration as to you having an interest in that mortgage for the $5,500 salary voted to you?

A. No, sir.

Q. Why did you never ask for one, or did you ever ask for one?

A. No, sir.

Q. Why didn't you?

A. Well, it was for the simple reason that we were satisfied that if it ever went into a legal proceeding in court we felt fearful—I know I did, and I know I was—I can't recall the conversation, unless Mr. Wood may have mentioned something; but that was my fear——

Q. (Interrupting.) Fear what?

A. That it wouldn't stand the legal test.

Q. The $20,000?

A. Lose on that $20,000, and might recover on the actual, hard cash we had loaned the company.

Mr. DICKSON: How is that?

A. We would lose on the salary advanced. I understand the by-laws didn't authorize anything of that kind.

Mr. BROWN: State whether or not that was the reason why no writing was made in regard to it.

A. That is the reason I never asked for any; I didn't want anything on paper to criminate anybody in a thing of that matter.

Mr. BROWN: My brother Judd wants to ask a question.

Mr. JUDD: By your honor's permission.

Q. Mr. Whitney, during the time of which you have spoken that this conversation and negotiations were going here with ref-

213 erence to the compromise and settlement of the mortgage debt did you have any conversation with Mr. C. W. Bennett, who was one of the attorneys for the defendants in that foreclosure suit?

A. Yes, sir.

Q. What occurred between you and Mr. Bennett?

Mr. DICKSON: We object to that.

Mr. JUDD: I will show that he reported it to Lawrence; if I don't, I won't insist on it.

Mr. DICKSON: We object to what occurred between him and Mr. Bennett.

Mr. JUDD: I want to show the conversation that occurred between the witness and Mr. Bennett, who represented the other side, and show that he reported that conversation to Mr. Lawrence on two different occasions and what Mr. Lawrence said about it.

Mr. DICKSON: We have no objection to his conversation with Lawrence and what he reported to Lawrence. He may state that as the result of any interview he had with Mr. Bennett.

Mr. JUDD: Well, what is the objection to what Mr. Bennett said?

Mr. DICKSON: It is incompetent.

The COURT: I think anything that he said to Mr. Bennett and repeated by Mr. Bennett to Mr. Lawrence it would be just the same as if it was said to Lawrence.

Mr. MARSHALL: Your honor misapprehends the proffer; it is not that Mr. Bennett reported anything to Mr. Lawrence, but only that Mr. Whitney told Mr. Lawrence thereafter that he had such and such a conversation with Mr. Bennett. Then the material matter would be what Mr. Whitney said to Mr. Lawrence. Mr. Bennett was counsel against Mr. Lawrence at that time and reported nothing to Mr. Lawrence.

214 Mr. JUDD: The offer is to prove that Whitney went to see Bennett, as representing the other side against their interest in the mortgage, and that he had a conversation with Bennett and that he went back and reported that conversation to Lawrence.

The COURT: Well, whom was Bennett attorney for at that time?

Mr. JUDD: Attorney for the defendants in this foreclosure suit that they were seeking to compromise.

The COURT: How would anything that Bennett said be evidence?

Mr. JUDD: If your honor please, this mortgage suit was compromised. We expect to show the grounds upon which it was compromised, and we expect to show that the defence was upon the ground of the illegality of this salary that was put into this mortgage, and I am opening the way now to that.

The COURT: Well, it may be received.

Mr. DICKSON: We object to the witness testifying to any conversation which took place between him and Mr. Bennett at which it is not pretended that Mr. Lawrence was present, and note an exception to permitting the witness to testify to that conversation.

Q. Did you have a conversation with Mr. Bennett?

A. Yes, sir; the same day that Mr. Lawrence and Mr. Wood and myself had the conversation.

Q. Did you report that conversation to Mr. Lawrence?

A. Yes, sir.

Q. What did you tell Mr. Lawrence?

A. I told him that I had just come from Mr. Bennett's office and

had had a talk with him, asking his views and what they were willing to give to compromise that mortgage, and that Mr. Bennett had said that he had seen the representatives of the Wells-Fargo Company claim, or his side of the matter, and they had a talk together, and they decided to give Mr. Lawrence thirty per cent. of the interests in the Eureka Hill Mining Company as it was then organized or the Wells-Fargo claim—that is, what they owned in the claim.

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Q. Well, did you subsequently see Mr. Bennett and have a further conversation with him on the subject?

A. I did; something like a week later.

Q. Did you report that conversation to Mr. Lawrence?

A. Yes, sir.

Q. What did you tell Mr. Lawrence?

A. I told him that Mr. Bennett said the ultimatum—he had a further talk with parties interested, and their ultimatum was thirty per cent.

Q. Was Mr. Bennett the attorney for the defendants in that suit—one of the attorneys of the firm of Bennett & Whitney?

A. In the foreclosure suit; yes, sir.

Cross-examination of JOHN N. WHITNEY by Mr. DICKSON:

Q. Do you say that Messrs. Bennett & Whitney were the attorneys for the defendant in that foreclosure suit?

A. They were the attorneys—no, sir; not for Joab Lawrence.

Q. For the defendant in the foreclosure suit?

A. Yes, sir.

Q. Are you sure of that?

A. What say?

Q. Who was the defendant in the foreclosure suit?

A. Wells, Fargo & Co. and Eureka Mining Company.

Q. Which was defendant?

A. The Eureka Mining Company of Utah was one of the defendants and Bennett & Whitney was attorneys for that company.

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Q. For Wells, Fargo & Co.?

A. They had bought the Wells, Fargo & Co.'s interest at that time; I think possibly it might have been organized.

Q. For whom were they acting as attorneys in that litigation, if you know?

A. The Eureka Mining Company of Utah.

Q. That is the old company?

A. Yes, sir.

Q. When did you first get acquainted with Joab Lawrence?

A. In May, 1871.

Q. What day in May?

A. I should say about the 12th or 15th.

Q. From the 12th to the 15th of May, 1871?

A. Yes, sir.

Q. Where?

A. At the Palmer house, in Chicago.
Q. That is the first time you ever met the man to know him?
A. No, sir.
Q. I mean to speak to him.
A. Yes, sir.
Q. The first time you had ever been introduced to him?
A. Yes, sir.
Q. What was your business with him on that occasion?
A. My business with him was to show him a bond which I had and solicit his co-operation in furnishing the capital to work the mine.
Q. That is the bond that you had on this Eureka property which afterwards became the property of the corporation?
A. Yes, sir.
Q. What was the nature of that bond, generally, without going into the details?
A. It was a bond in favor of Joshua C. Richards and John N. Whitney.
217 Q. Yourself?
A. Yes, sir; and I had mining property which I had paid in cash $30,000 for, and it was put in the bond at a valuation of $30,500. The other signers of the bond—the largest company was what we called——
Q. (Interrupting.) I don't care about the details of it. What was the general nature of the bond—for what property, generally?
A. It was for the property that was subsequently conveyed to the Eureka Mining Company of Utah.
Q. What was the condition of the bond?
A. The condition of the bond was that if Joshua C. Richards and John N. Whitney should furnish a deposit as working capital for a corporation to be organized, after the money was supplied, that——
Q. (Interrupting.) Furnish what?
A. Furnish one hundred thousand dollars in money for a working capital, that Richards and Whitney should have, for doing so, one-half of the interests that the Fon du Lac Company had, the Crismon Company had, and the various parties signing the bond.
Q. As I understand you, there were some parties owning mining claims out there in Tintic?
A. Yes, sir.
Q. Who entered into a bond with you and Richards?
A. Yes, sir.
Q. By which they agreed that if you should raise a hundred thousand dollars within a specified time, to be used as working capital, that they would organize a corporation and convey their several properties to the corporation?
A. Yes, sir.
Q. And in consideration of the hundred thousand working capital which you and Richards were to raise they would transfer to you each one-half of their stock in the company; that is it?

A. Well, in substance that would be it, but the stock was not transferred; it was issued direct.

Q. Well, you were to have one-half?

A. Yes, sir; and the capitalization of the corporation was named in the bond.

Q. Your business the first time you met Lawrence, along about the middle of May, 1871, was to induce him to put up this capital?

A. Yes, sir.

Q. Well, after meeting him there, what happened?

A. What was said?

Q. No; what happened; what did you do—you explained to him the nature of your business, I suppose?

A. I showed him the bond and I showed him the assays and showed him some bullion and some ore, with assayers' certificates.

Q. I don't care to spend any time on these preliminary matters. Did he come here with you to Utah?

A. Yes, sir.

Q. What time did you reach here?

A. We reached here, I should say, about the 16th or 17th day of May.

Q. Did you meet Wood here?

A. Yes, sir.

Q. He was here waiting for you?

A. Yes, sir; I called him up by letter or telegram.

Q. How long had you known Wood prior to that?

A. I guess about 25 or 30 years.

Q. Before that?

A. Yes, sir.

Q. Known him pretty well?

A. I used to know him in Massachusetts.

Q. You knew him very well?

A. No, sir; I only knew him as he would come home where I was living. He would come home about every Saturday night and go back Monday morning to Boston.

Q. You knew him very well for 25 years, off and on?

A. Off and on.

Q. For twenty-five years prior to May, 1871?

A. I should judge so.

Q. You say you called him here by letter at that time?

A. By letter or telegram. I will correct myself if you will allow me to.

Q. In what respect?

A. About how well I knew him. I knew him just about as well as I know you.

Q. The court don't know anything about it and I don't care anything about it. What did you call him here for?

A. I called him here for——

Q. (Interrupting.) To try and interest him in the raising of this capital also?

A. Yes, sir.

Q. That was the purpose?

A. That was the object.

Q. That was what you informed him by letter or telegram, whichever it was?

A. Yes; and I expressed in my letter—I think it was a letter now—I expressed I would like to have him come up and take a look. I had bought a mine and had a bond on a large amount of property, and he had been mining as I understood. I hadn't seen him for a great many years. He had been living in San Francisco prior to that—and to come up—wanted him to come up and look at this property and see what his views was of it. I knew nothing about mines at all.

Q. You wanted him to take an interest in it, didn't you?

A. Yes, sir.

220 *A. Yes, sir.*

Q. In raising the capital?

A. Yes, sir; in raising the capital.

Q. And in obedience to that letter he came and met you and Lawrence on your return from the East?

A. Yes, sir.

Q. Along about the 16th or 17th of May?

A. Yes, sir.

Q. Wood was a perfect stranger to Lawrence also at that time, wasn't he?

A. Yes, sir.

Q. Never had seen him before?

A. No, sir.

Q. And, as far as you know, knew nothing of him at all before?

A. No, sir.

Q. So that, while you and Wood had been acquainted a number of years, each of you were entire strangers to Lawrence at that time?

A. Yes, sir; I should judge so.

Q. Now, after you all three met here you went down to the mine, didn't you?

A. Yes, sir.

Q. To look at it?

A. Yes, sir.

Q. All three?

A. Yes, sir.

Q. Wood coming along to see whether he wanted——

A. (Interrupting.) Wood went along with us.

Q. To see whether he wanted to take any of it, and Lawrence to see whether he wanted to take?

A. Yes, sir.

Q. That was the mission of both of those gentlemen down there?

A. Yes, sir.

Q. How many days did you spend there?

A. Two or three days.

Q. Going through the various openings of the mine?

A. Yes, sir.

221 Q. Over the hill, the surface of the several plains?
A. Yes, sir; it was most all surface; there was only one shaft.
Q. Well, you went over the surface of the several plains that were in contemplation of purchase?
A. Yes, sir.
Q. Wood was satisfied at the outlook, was he?
A. Wood didn't say nothing to me about how he liked it.
Q. Didn't you ask him how he liked it?
A. I don't think I did.
Q. You had called him there for that purpose, hadn't you?
A. Yes, sir.
Q. Because he was a miner, as you understood—knew about mines—and you didn't, and that was your purpose in bringing him there to look at the mine, didn't you say?
A. I might have asked him how it looked.
Q. Wait a minute. Isn't that what you said; that that was your purpose in calling him here from San Francisco?
A. Yes, sir.
Q. Now, that being your purpose and he having gone and examined the mine, didn't you ask him how he liked it?
A. I might have asked him.
Q. Don't you know you did?
A. Well, I think I did.
Q. What did he say about it; that he was satisfied or was not?
A. I think he said to me that he liked it.
Q. Thought well of the proposition?
A. Yes.
Q. How?
A. No—well, he said he liked the prospect of the property.
Q. Did he say he thought well of the proposition?
A. I didn't make any proposition to him at all.
222 Q. Well, thought well of your proposition—that is, the proposition that you had obtained or secured from the owner?
A. Yes; the bond that I had got.
Q. Didn't he advise you that that would be a good thing or a bad thing?
A. He thought it was a good property.
Q. And that if you could get that incorporated and all that property conveyed to a company and secure one-half of the stock for the hundred thousand dollars it would be a good thing for you—a good investment?
A. Good thing for me—yes—and Mr. Richards.
Q. That that would be a good investment for anybody; wasn't that his advice?
A. He didn't say anything as you are repeating it now.
Q. Well, in substance?
A. He said he thought the property looked well.
Q. Didn't you call that friend here because you regarded him as an experienced mining man and you wanted his judgment?

A. Yes, sir; his judgment was much better than mine.

Q. Now, that being so, didn't you try to get his judgment as to whether this would be a good investment for any one?

A. I think I might have asked him what he thought of the property.

Q. Well, did he advise you whether it would be a good investment for any one to put up a hundred thousand dollars on those terms?

A. I don't think that he spoke about that the way you express yourself.

Q. Did he advise you at all about whether it was a good *or* investment or not, such as you contemplated?

A. I didn't think he did one way or the other.

223 Q. Did you ask him?

A. I don't know that I did.

Q. You called him all the way from San Francisco for that purpose, didn't you?

A. Yes, sir.

Q. When he got here you didn't ask him?

A. I don't think I asked him about its being a good investment if the bond was carried out.

Q. When did you ask him?

A. I think I asked him about the mine as I repeated before, and he said he thought it was a good property.

Q. Well, a mine might be a very good mine for ten thousand dollars and a very poor mine for a hundred thousand dollars?

A. It might.

Q. And a hundred thousand dollars was what you were to put up?

A. Yes, sir.

Q. Now, didn't you ask him whether it was a good mine for an investment of that kind—that is what you wanted to know, is it?

A. You have asked me that two or three times, and I don't remember that there was any such conversation of the magnitude you are trying to convey.

Q. Didn't you try to get his judgment as to whether or no the mine was such as would justify you or anybody else in putting up a hundred thousand dollars on the terms contained in that bond?

A. I might have asked him what he thought of the property after we had meandered around and looked over it for two days, and we thought of it, as I say and he said, "I think it is a pretty good property."

Q. Of course you explained to him what your bond was—its terms?

224 A. I evidently read it to him.

Q. And after you had read it to him and after he had examined the property he expressed a very favorable opinion of it, did he?

A. Yes, sir.

Q. And he went into it?

A. He did go into it.

Q. Put up money on the bond, didn't he?
A. No, sir.
Q. Didn't you so testify in New York?
A. If I did I will correct myself.
Q. Is your memory better now than it was then about it?
A. Yes; it has been——
Q. (Interrupting.) Who has refreshed it with regard to this particular matter?
A. Mr. Wood's deposition.
Q. Mr. Wood's deposition?
A. Mr. Wood's deposition tells—he tells himself how he got into it.
Q. Now, let me see what you testified to. Did you testify in New York in this case, or rather in the case which was pending there in which you and Mr. Wood were plaintiffs and Joab Lawrence was defendant, involving the same matters, as follows:
"Q. Did you three (meaning you and Lawrence and Wood) examine this property? A. We went down and took a look at the property and returned to Salt Lake City on the 24th of May of that year, 1871, and Mr. Lawrence and Mr. Wood decided that they would take that interest."
A. Yes, sir.
Q. Was it true?
A. Yes, sir.
Q. They decided that they would take that interest?
A. Yes, sir.
225 Q. That is, they would take two-fifths for a hundred thousand dollars?
A. Yes, sir.
Q. At that time?
A. It was on the morning of the 25th day of May, 1871.
Q. That those two men decided they would take two-fifths of the stock and put up a hundred thousand dollars?
A. As I understood it at that time that they decided, but I——
Q. (Interrupting.) Wait a minute.

Mr. JUDD: Hasn't the witness a right to finish that answer?
The COURT: Yes, sir.
Mr. DICKSON: The court will bear in mind that the other party to this transaction is dead; this gentleman is here to tell his story, and when he has finished an answer as he has and I am about to put another question to him I don't want to be interrupted in the cross-examination and have the cross-examination broken into all the time; it is unfair. If there is anything that he desires to explain, why of course it can be done.
Mr. JUDD: That is what he was going to do, to make an explanation to the answer.
WITNESS: It is different from what I should have said.
The COURT: Anything that is responsive to the question he has a right to say, of course.

Q. Did you testify in New York as follows: "Q. And how much

of the hundred thousand dollars originally put in did you furnish? A. I didn't furnish anything towards that at all. Q. How much did Mr. Wood furnish? A. I think twenty-five thou-
226 sand or thirty thousand dollars. Q. Did not Mr. Lawrence furnish the rest? A. I presume likely he did. Q. You know he did? A. I can't say how much. Q. You know what Mr. Wood furnished, and that Mr. Lawrence furnished the rest? A. Yes, sir; Mr. Wood and Mr. Lawrence furnished a hundred thousand dollars between them, but I cannot positively say how many dollars each one put in, as I have stated before." Did you testify there?

A. If you are reading my testimony I did.

Q. Well, don't you remember whether you testified to that effect or not?

A. I don't remember.

Q. Was it true, if you did?

A. No, sir.

Q. It was not true?

A. I will correct that.

Q. All right, correct it briefly.

A. The one hundred thousand dollars was furnished, and I had subsequently learned that Mr. Lawrence asked Mr. Wood if he would contribute anything towards that one hundred thousand dollars, or wanted anything in this venture.

Q. When did you learn that from Mr. Lawrence?

A. I learned—not from Mr. Lawrence. I didn't learn that from Mr. Lawrence.

Q. From whom?

A. I learned that from Mr. Wood's deposition.

Q. Since you gave your deposition?

A. Yes; I knew. I supposed that his subscribing to the two hundred and fifty shares was what he paid, which would be at fifty dollars a share; that would be a correct supposition.

Q. Before you had read Mr. Wood's deposition you testified positively and directly in New York, did you not, that he put up twenty-five or thirty thousand dollars of that hundred thousand?

227 A. I must have done it right there in that.

Q. Why did you so testify if you didn't know what you were testifying about?

A. I knew that Mr. Wood and Mr. Lawrence had some talk—went off by themselves, and Mr. Lawrence decided—I made my proposition direct to Mr. Lawrence that morning; asked him if he was going to put up that one hundred thousand dollars. I didn't ask Mr. Wood if he wanted to put — anything. I directed my conversation entirely to Mr. Lawrence on the morning of the 25th of May, and asked him — he wanted to put up one hundred thousand dollars or was going to put it up, and he said that he only brought fifty thousand dollars with him, and then he——

Q. (Interrupting.) You are not answering my question, Mr. Whitney. Did you know when you testified in New York whether or not Wood had put up any part of that hundred thousand dol-

lars; when you gave your testimony in New York did you know whether or not Wood had put up any part of that hundred thousand dollars?

A. I knew that he subscribed for 250 shares and I knew that he had paid for that.

Q. Will you answer my question now? Did you, when you testified in New York that Mr. Wood had put up twenty-five or thirty thousand dollars of that hundred thousand, know whether it was true or not?

A. I don't think I knew how he put it up or when he put it up.

Q. Did you at that time know whether he had put — any part of that hundred thousand dollars?

A. I don't know whether I did, but I state——

Q. (Interrupting.) Wait a minute. If you didn't know it,
228 why did you testify that he had?

A. I testified as I then understood it.

Q. As you then understood it from whom?

A. He and Lawrence had some talk amongst themselves and entered into some arrangement or agreement. How much Mr. Wood had contributed I knew nothing about it.

Q. Well, you testified about it. Did you testify in New York on that same matter as follows: "Q. State the transaction out of which that note grew"? You knew what notes are referred to here, of course?

A. Three notes.

Q. "In the morning of the 25th of May, 1871, Mr. Lawrence having concluded with Mr. Wood to take two-fifths of the capital stock of the corporation that was to be organized on that day"—was that true?

A. That was as I understood it; what portion Mr. Wood was taking I didn't know.

Q. You testified there, didn't you, not according to your understanding, but you testified that on the morning of the 25th of May Lawrence and Wood had concluded to take two-fifths of the capital stock, didn't you?

A. Yes, sir.

Q. "Lawrence stated that he had but fifty thousand dollars of the hundred thousand necessary and required to be deposited to the credit of the company on that day—fifty thousand in cash; but he says, 'We will take our promissory notes, you and I, and Mr. Wood will make one each and endorse one for the other, and deposit with this cash and ask the bank to issue us certificates of deposit for the sum of one hundred thousand dollars; these notes shall be for my
and Mr. Wood's subscription.'" Did Lawrence say that—
229 first I will ask you did you testify in New York that that was what Lawrence said?

A. Yes.

Q. Did he say it?

A. That is what I understood.

Q. From Lawrence—that Lawrence said in the presence of yourself and Wood that these notes would be for his, Lawrence's, and

Wood's subscription. You heard Lawrence say that, did you, in the presence of Wood?

A. I don't know whether it was in the presence of Wood or not.

Q. Wasn't Mr. Wood present when you were talking about these notes and what should be done with them?

A. I thought he was. I know he went to the bank with us.

Q. Now, do you say that in that conversation that Lawrence said that these notes would be for his and Wood's subscription to the stock?

A. If I did, I will correct and say that as I understood it.

Q. Didn't you swear to that without any qualification at all in New York?

A. Well, as I understood it and understand it now.

Q. Didn't you swear to that without any qualification when you gave your testimony in this case in New York?

A. Why, I must have sworn to it if they got it there.

Q. Did you know whether it was true or not?

A. I believed it was true at the time.

Q. Do you know whether it is true now?

A. I find now that Mr. Wood had told Mr. Lawrence, at Mr. Lawrence's solicitation, he would subscribe for 250 shares that was actually owned by Mr. Lawrence.

230 Q. So that you found that out from Mr. Wood's deposition?

A. I had no reason of knowing it before. I know the money was furnished.

Q. Hold on. I understand that since you have read Wood's deposition you discovered that Wood didn't put up any money on the hundred thousand dollars?

A. Yes, sir.

Q. But what was it that prompted you to testify in New York that Mr. Lawrence said on the morning of the 25th in your presence and to you that these notes would be for his and Wood's subscription to that stock; why did you say that?

A. Well, it was Wood's subscription and Mr. Lawrence's subscription.

Q. Did Lawrence say that that morning, that these notes would be for his and Wood's subscription?

A. I can't say; but I should conclude that that was my understanding of it.

Q. Do you remember that Lawrence said anything of that kind?

A. It is so long ago I can't tell you what Mr. Lawrence said positively.

Q. You testified there that Mr. Lawrence made that remark; that Mr. Lawrence said, that "These notes shall be for my and Mr. Wood's subscription." Do you remember of his saying anything of the kind?

A. I have no doubt but what he might have said it, and I can't repeat it word for word.

Q. Have you any recollection as you sit there of hearing any such words from Mr. Lawrence as that?

A. I wouldn't have no doubt in saying that I think he did say it.

Q. Have you any recollection now as you sit there of having heard him say it?

A. If you will permit me to explain how that transaction occurred, I will——

231 Q. (Interrupting.) No; I am asking for your recollection now. As you sit there have you any recollection of having heard Lawrence say, on or about the morning of the 25th of May, 1871, "These notes shall be for my and Mr. Wood's subscription"?

A. He told me——

Q. (Interrupting.) Answer that question.

A. I understood that Mr. Wood was subscribing at that time.

Q. Pay attention to the question. Do you remember as you sit there today—have you any, the faintest, recollection of having heard Lawrence say on the morning of the 25th of May, "These notes shall be for my and Mr. Wood's subscription"?

A. Well, I am inclined to think that that talk may have been about their subscriptions.

Q. You are inclined to think you heard Lawrence make that statement?

A. Yes; we three were together, and I think that——

Q. (Interrupting.) Now, don't you know—you say you have been corrected by Mr. Wood's deposition. Didn't you read that deposition, a statement by Mr. Wood, that he never agreed to take any stock at all until July of that year?

A. Mr. Wood says in his deposition that Mr. Lawrence invited him to subscribe for 250 shares for him, and Mr. Lawrence would most naturally say that, and I believe now that he did.

Q. Now, coming back to the question, don't you remember that Mr. Wood's testimony, by which you say you are corrected here, is that he never agreed to take any shares until July, 1871?

A. Yes; I remember that. He could subscribe, however.

Q. He never having agreed to take any shares until July, 1871,
232 do you say that you heard Lawrence say in Wood's presence, on the 25th of May, that these notes shall be for Wood's subscription and mine?

A. No, sir; he said—you don't allow me to explain anything about those notes.

Q. I am not asking any explanation.

A. I wasn't hunting anybody's notes.

Q. The question is, Do you say now, bearing in mind that Wood says he never agreed to take any stock at all until July, that you heard Lawrence say, on the 25th of May, in Wood's presence, that these notes were to be for his and Wood's subscription?

A. The notes and cash put up with the notes were for his and Wood's subscription.

Q. You heard him say that?

A. That is what I understood, and I think he explained it fully to me right then and there.

Q. You now say, do you, that in the presence of Wood, on the

25th of May, you heard Lawrence say that these notes were to be for his and Wood's subscription to that stock?

A. The notes and cash.

Q. The notes and cash?

A. The notes and cash; put it anyway you like.

Q. You heard him say that?

A. Yes, sir.

Q. In the presence of Wood?

A. Yes, sir; and in the presence of J. C. Richards.

Q. Didn't Wood object—didn't Wood say, "I haven't agreed to take any stock"?

A. He did agree with Mr. Lawrence to subscribe.

Q. Did Wood make any objection when Lawrence said, "These notes were to be for his and Wood's subscription"—didn't Wood say, "Why, I haven't agreed to take any stock and I am
233 not putting up any notes"?

A. I don't know anything about that at that time.

Q. Did Wood make any objection?

A. No, sir.

Q. Are you quite clear now that you heard Lawrence say that?

A. I think I am, sir.

Q. How much stock did you have?

A. At the organization of the company?

Q. At the organization of the company.

A. 565 shares.

Q. What did you testify as to that in New York?

A. That I had some three or four hundred shares.

Q. Didn't you testify in New York that at the original incorporation you had but 250 shares?

A. No, sir; I said I subscribed for 250 shares.

Q. And that all that you got over and above 250 you purchased from various parties after the organization?

A. Well, I couldn't say; they asked me if it was in my hand and I told them I couldn't say.

Q. Didn't you say that all you had at the time of the organization was 250 shares, and that anything you got afterwards you got by purchase from various individuals, giving the name?

A. I don't know as I said that, because it is very clear in my mind that I got 555 shares.

Mr. BROWN: You said in one place 555 and then you said 565; which was it?

A. The whole amount of shares I owned in the company at the organization was 560 shares.

Mr. DICKSON: Did you testify in New York: "How much of this stock, if any, was issued to you of this Eureka Mining Com-
234 pany? A. 250 shares or more. Q. Do you know how much? A. I think it is 250 in my name at that time." Is that true?

A. Yes, sir.

Q. Did you have any more at that time?

A. Yes, sir.

Q. "To whom was the remainder of his capital stock issued? A. There was 250 shares issued to William H. Wood and 17 or 18 hundred shares to Mr. Lawrence, perhaps; I couldn't state exactly how much, but from 15 hundred to 1,700 shares perhaps. Q. How much was the total capital of this company? A. The capital was five hundred thousand dollars. Q. What became of the rest of the stock when it was originally issued? A. It was issued and delivered to the various bond-signers and owners of the property, being conveyed to the corporation. I could name, perhaps, a great many of those names that joined in that bond." Did you testify to that?

A. Yes, sir.

Q. Didn't you mean to be understood there as claiming that 250 shares only were issued to you at that time?

A. No, sir.

Q. Now, speaking of the time when you turned over the stock to Lawrence, which I think you say was in November of 1871, didn't you testify in New York as to the number of shares you had at that time as follows: "Q. When you say you handed him your shares, what do you mean by your shares? A. All the shares I then held in the Eureka Mining Company of Utah. Q. Do you mean the certificates for the shares—certificates of shares? A. Yes, sir. Q. How were these certificates drawn at that time (November, 1871)?

A. I think I had one certificate of 250 shares and I thinkI had
235 another of one hundred at that time, and some less than a hundred; I don't know; probably two or three certificates. Q. Less than one hundred each? A. Yes, sir. Q. Were these certificates standing in your name at the time? A. I couldn't say whether they were or not, now. The shares that I had purchased and had delivered to me, probably they may have been endorsed in blank, but I think they must have been in my name. I couldn't state positively. Q. Do you recollect whether or not all of these shares—share certificates—were or were not all endorsed? A. The shares standing in our names were all endorsed in blank by myself and Mr. Wood. I think, as near as I can remember, about that time I owned something like three hundred or four hundred shares more." Did you testify to that?

A. Yes, sir.

Q. That was true, too, was it?

A. Yes, sir.

Q. Didn't you testify there in New York, "Did you receive more than 250 shares of the original issue? A. If I did—I don't think I did, however." Didn't you testify in New York that you didn't think you got more than 250 shares of the original issue?

A. I don't think I did.

Q. "Did you receive more than 250 shares of the original issue? A. If I did—— Q. No; did you? A. I don't think I did, however." Did you testify to that there that you didn't think you received more than 250 shares of the original issue?

A. Well, I ought to have known that I had more shares than that.

Q. Did you testify to that here?

A. I may have testified to it.

Q. If you did you were mistaken—that is what you mean to say?

236 A. I was mistaken in that because—whether them shares was all issued in my name or some other.

Q. Then did you go on in your deposition there and explain how you got all except the 250 of the original issue?

A. I had been receiving——

Q. (Interrupting.) Wait a minute. Didn't you go on there and testify as follows:

"Q. Did you ever have any other shares than the 250? A. Yes, sir. Q. When and from whom did you get them? A. I got some of these shares that stand in the name of J. C. Richards. Q. How many? A. I couldn't say, sir. Mr. Lawrence got some of those shares. Q. How many? A. Mr. Lawrence—there is a memorandum which shows that he got sixty shares. Q. How many did you get of the Richards shares. A. Of the Richards, I couldn't say. I got an amount from a man by the name of George W. Harmon, of Omaha, subsequently transferred to me by him. Q. Did you get any from Prismon? A. Yes, sir; some of those Prismon shares subscribed. Q. Then whatever shares you had beyond the 250 you purchased after the original issue? A. Yes, sir; Mr. Lawrence kept purchasing shares on the outside in the same manner." Was that true?

A. I purchased some shares——

Q. (Interrupting.) Wait a minute. Did you testify to that in New York?

A. Well, if it is there I must have testified to it.

237 Q. Was it true?

A. Well, I was going to correct myself if you allow me to.

Q. It was not true?

A. And explain why I was mistaken.

Q. You may explain in a moment. You recognize, do you not, Mr. Whitney, and admit, that twice over *the* this deposition in New York you testified positively that 250 was all you had of the original issue?

Mr. BROWN: He didn't testify twice over.

Mr. DICKSON: Yes; he did. I have read it to him twice.

Mr. BROWN: Well, go on.

Q. Now, what correction?

A. Having received some shares in settlement with J. C. Richards for some money that he owed me—I remember that distinctly; I remember that I subscribed for 250 shares of stock, and that my property was put in at thirty-five thousand dollars outside of that subscription; that subscription came from the—the two hundred and fifty subscription came from the interest that various parties owned that would be my share of the profits out of the bond, and, the time being so far back, it was rather difficult for me to recall my memory and get the fact as it now appears on the record of these books.

Q. "Did you, when you testified in New York, believe what you there testified to, namely, the 250 shares were all that you had of the original issue, and that any stock over and beyond that you purchased after the original issue? A. I believed that I subscribed for 250 shares and a certificate of that magnitude was issued to me in my name. Q. Did you believe when you have your testi-
238 mony in New York that you only had 250 shares of the original issue of that, and that any stock that you had over and beyond that you purchased after the original issue? A. Well, I didn't know how I got those other shares then; it wasn't fresh enough in my mind to explain it fully and correctly. Q. Did you believe this was true when you swore to it, that whatever shares you had at any time beyond the 250 shares you purchased after the original issue? A. Yes, sir." Did you believe that?

A. I must have believed it at that time.

Q. You have corrected your memory since?

A. Yes, sir; after seeing the stock ledger and the books of the company. The stock ledger was not in New York.

Thereupon court adjourned until tomorrow morning at 10 o'clock.

SATURDAY, *June 28th*, 1890—10 o'clock a. m.

JOHN N. WHITNEY being recalled, the cross-examination was resumed as follows by Mr. Dickson:

Q. Didn't you testify in New York positively that Mr. Lawrence didn't put up the whole of the hundred thousand dollars capital?

A. I think I did.

Q. How?

A. I think I may have done so.

Q. Didn't you testify that he didn't put up to exceeding sixty-five thousand dollars of it?

A. I may have testified that Mr. Wood put up a portion and Mr. Lawrence put up a portion.

Q. Didn't you testify to the amount that Lawrence put up
239 that it didn't exceed sixty-five thousand dollars of the hundred thousand, and wasn't that the truth?

A. I think, if I remember, that I testified that Mr. Lawrence put up sixty-five—somewheres in the neighborhood of sixty-five—thousand dollars.

Q. Let me read your testimony and see if you remember it. "Didn't Mr. Lawrence furnish the whole of the hundred thousand dollars that was paid for two-fifths of the stock of the original company? A. No, sir; he did not. Q. How much did he furnish of that hundred thousand dollars? A. About fifty-five or sixty-five thousand dollars."

A. I believe I stated that.

Q. You remember testifying to that?

A. I may have said that; yes, sir.

Q. He put up fifty thousand anyway on the morning of the 25th of May, didn't he?

A. Yes, sir.

Q. And he signed a note with you — named Wood as endorsers for fifteen thousand dollars, did he not?

A. Yes, sir.

Q. That made just sixty-five thousand dollars?

A. Yes, sir.

Q. Now, under the arrangement that you had with the parties to that bond, if you succeeded in raising the hundred thousand dollars capital within the time stipulated in the bond you would have one-half of all the stock?

A. Yes, sir.

Q. When organized the stock — divided into five thousand shares, wasn't it?

A. Yes, sir.

Q. Now, Wood got of that two hundred and fifty, finally, subscribed originally two hundred and fifty, and afterwards, in July, agreed to take it and did take it?

240 A. Subscribed for two hundred and fifty, but how much more he got I don't know. I don't know that he got any more. He may have got more than that.

Q. All he got of the original issue was two hundred and fifty shares?

A. In his own name.

Q. And Richards, the other man in the bond with you, got two hundred and fifty shares?

A. He subscribed for two hundred and fifty and got considerably more.

Q. That made five hundred; Lawrence subscribed for seventeen hundred and fifty?

A. Yes, sir.

Q. And you for two hundred and fifty. That made the whole fifty per cent., didn't it?

A. Yes, sir.

Q. And in addition to that you got three hundred and five shares, didn't you?

A. Yes, sir.

Q. Now, isn't it a fact that for that additional three hundred and five, or rather three hundred of the three hundred and five shares, that you gave as consideration for that the twenty-thousand-dollar note that you signed?

A. No, sir.

Q. And isn't that why you swore in New York that you never did have of the original issue more than two hundred and fifty shares?

A. If I swore to that that is——

Q. (Interrupting.) Isn't that why you swore to that?

A. No, sir.

Q. You did swear to it, you know?

A. No, sir.

Q. Isn't that why you swore to it?

A. No, sir.

Q. That you only got two hundred and fifty of the original issue,

and that all over and beyond that, if you ever acquired any,
241 you got by purchase. Isn't that the explanation of your testimony?

A. If I did, I didn't intend to swear that way.

Q. Well, you remember yesterday my calling your attention to that testimony?

A. Yes; I knew very well I had put in my contract that I referred to.

Q. And isn't that why, in order to conceal that fact, that when you made a transcript of the stock ledger and took it on to New York and introduced it there as showing just how the stock stood at the time of the original issue, that you omitted from your own account that three hundred and five shares?

A. No, sir.

Q. Why did you omit it?

A. I don't know why it was omitted.

Q. You did omit it, didn't you?

A. I don't know whether I did or not now.

Q. This is your stock account, isn't it?

A. This is the stock ledger.

Q. And that is your account?

A. That is my account.

Q. From which you took that transcript?

A. Yes, sir.

Q. Which you introduced in evidence in New York?

A. Yes, sir.

Q. And swore to be true, didn't you?

A. When I got to New York, I will say that — come to look at the exhibit there I had made I found it didn't foot up five thousand shares.

Q. You didn't find that out until——

A. (Interrupting.) And I didn't know, and I don't know now, why there should be anything left out.

Q. You didn't find that out until your attention was called to it on cross-examination, did you?

A. I hadn't footed it.

Q. That is your account, at all events, in the stock ledger
242 from which you made a transcript?

A. That is my original stock down there (indicating).

Q. Wait a moment. Answer my question. May 25th, certificate of stock, number of certificate 35, 250 shares, and immediately beneath it ditto-marks throughout for the date and everything else?

A. Yes, sir.

Q. Number of certificate, 39; 305 shares?

A. Yes, sir.

Q. This is the paper you introduced in evidence in New York?

A. Yes, sir.

Q. As containing a correct showing of this stock as it stood on the original issue, is it not?

A. Yes, sir; that is what I had there in New York.

Q. And you put opposite your own name, John N. Whitney, 250 shares?

A. Yes, sir.

Q. How did you come to leave out that other 300 shares?

A. I don't know; that proves it to be not a correct copy of this ledger.

Q. We can all see that, of course, but isn't the explanation of that simply this, that in order to raise the necessary hundred thousand dollars you were forced to go on a note for twenty thousand and raise a portion of it, and that you acquired that three hundred in that way and were concealing that fact from the court in New York?

A. No, sir; that is not correct.

Q. You can't give any explanation, however?

A. Of what?

Q. How it was that you testified there twice over that all you had was two hundred and fifty shares of the original issue, except that you were mistaken?

243 A. That is not the only account where there is subscribers to the stock or stockholders is omitted. I omitted one of James Carter. He was down for 121 shares.

Q. I am not asking you about that omission now.

Mr. BROWN: Wait a moment. That is a responsive answer.

Mr. DICKSON: No; my question was this:

Q. You are unable to explain how you testified twice over in New York that all you had of the original issue was two hundred and fifty shares.

Mr. BROWN: This is a part of an explanation of it. I submit it is a legitimate and responsive answer.

Mr. DICKSON: Go ahead.

A. That paper was taken off the ledger in July, 1875, at the instigation or request of Joab Lawrence, who having written to me from Fair Haven, New Jersey, to go to that ledger, if I could get a chance, and to look at and send him a copy of the entries in regard to stock owned by Captain E. B. Ward. That was all Mr. Lawrence desired. After getting that and getting it in correct form, as he requested me to do, I then went over the various accounts and put that in the form which it is for my own convenience, and why I left out the 305 shares I am unable to account for it.

Q. Now, you are through, Mr. Whitney?

A. Yes, sir.

Q. How do you explain your testimony in New York that all you had of the original issue was 250 shares, and that everything you ever had over and beyond that you acquired by purchase?

244 A. Having got that piece of certificate there in the shape it is, or statement as we call it, and having that before me or having seen it just before I gave in my testimony, I was testifying from what that related—stated.

Q. How do you explain your testimony given in New York that

Lawrence didn't put up of the hundred thousand dollars capital more than sixty-five thousand dollars?

A. I will explain it in this way, as I understood it——

Q. Why did you swear in New York that Wood did——

Mr. BROWN (interrupting): Did he finish that answer?

Mr. JUDD: He did not let him finish it.

Mr. BROWN: As soon as he gets his question out he shuts him off.

WITNESS: I was going to say more.

Mr. DICKSON: Well, say more.

A. As I understood at the time of the organization of the company, Mr. Wood and Mr. Lawrence had had some talk or agreement amongst themselves about taking this interest that I desired Mr. Lawrence to take, and what it was I didn't know at that time, and Mr. Lawrence suggested in his own way how that should be raised, and he invited me to go over and see Mr. Hussey. He said he hadn't brought but $50,000 in money with him, but he says, "You go over to Mr. Hussey and tell him we are going to incorporate a company today, and that we want to deposit fifty thousand dollars and fifty thousand dollars of notes, and ask him if he will take that and receive it as cash and carry it as cash and issue a certificate of deposit for $100,000."

Q. Now you are through?

A. That this money was to be deposited as working capital for that organization.

245 Q. Are you through now?

A. Yes, sir.

Q. Is that your explanation of why you swore in New York that Lawrence didn't put up to exceed $65,000 of the $100,000?

A. I didn't know at that time whether——

Q. (Interrupting.) Now, the question admits of an answer of yes or no. You have given an explanation and got through. Now, I ask you if that is your explanation of why you testified under oath in New York that Lawrence didn't put up to exceed $65,000 of the $100,000.

A. I can't answer that way, Mr. Dickson.

Q. Is that your explanation of it?

A. I will explain if you will permit me.

Q. Haven't you explained?

A. I have explained——

Q. (Interrupting.) Do you want to make another explanation?

A. I will explain why——

Q. (Interrupting.) I asked you before to explain and you started on and told this story. Is that the explanation or is there another to come?

A. That is another question you have asked me.

Q. No; it is the same question. Is that the explanation of why you testified under oath in New York that Lawrence didn't put up to exceed $65,000 of the $100,000?

A. If you will allow me to answer it in my own way I will answer it.

Q. Go on and answer it any way you like.

A. I will say I didn't know at the time I gave in my testimony at New York how much money Mr. Wood had advanced—what proportion of that $50,000 each had paid; that is the reason I testified in that way. The two had paid it.

246 Q. Are you in habit of testifying when under oath things that you don't know whether they are true?

A. I may have done that from the understanding I had at the time and believed it to be true.

Q. From whom did you get the understanding that Lawrence didn't put up but $65,000?

A. I supposed all the time——

Q. (Interrupting.) From whom did you get the understanding?

A. From Mr. Wood and Mr. Lawrence that they would pay these notes. I know when the $15,000 note was paid first they said they had paid it.

Q. You got them from Wood as well as Lawrence, the understanding——

A. (Interrupting.) Yes; they told me——

Q. (Interrupting.) That Lawrence put up but $65,000.

A. I didn't know how much they had put, either one of them.

Q. That is what you testified to, isn't it? From whom did you get the understanding that Lawrence only put up fifty-five or sixty-five thousand of that hundred thousand?

A. I didn't know how much he had put up.

Q. I say from whom did you get that understanding?

A. From talk made by Mr. Lawrence and Mr. Wood in the fall of 1871.

Q. So that it is true, is it, then, that from Wood as well as Lawrence you got the understanding that Lawrence didn't put up to exceed 65,000 of that 100,000?

A. I didn't know how much Mr. Lawrence had paid or how much Mr. Wood had paid.

Q. Why did you testify to it then, in New York, that he only put up fifty-five or sixty-five thousand unless you had the understanding from somebody?

247 A. I knew from what they had told me that they took those notes up as we were progressing with those lawsuits in Provo, and they required lots of money and spending lots of money, and when they took the first $15,000 note they stated to me——

Q. (Interrupting.) Who did?

A. Mr. Wood and Mr. Lawrence both spoke about that.

Q. Said that they had taken them up?

A. Yes, sir.

Q. Wood said that they had taken them up—meaning him and Lawrence?

A. Yes, sir; that the two notes had been paid.

Q. From whom did you get the understanding before you testified in New York that Wood had put up 30,000 of that $100,000?

A. Well, I didn't know how much Mr. Wood had put up.

Q. You testified, didn't you, that he put up twenty-five or thirty thousand?

A. Yes; I may have said that he put up——

Q. (Interrupting.) Why did you testify to that?

A. Because I understood that they had a good many shares than they had.

Q. Did you understand or had you understood before you gave your testimony in New York that Mr. Wood did in fact put up $25,000 of that $100,000?

A. If I so stated, why I wish to explain myself now that Mr. Wood I knew had subscribed for two hundred and fifty and he subscribed for that, but why he subscribed for it I didn't know.

Q. Why did you testify in New York that Mr. Wood put up 25 or 30,000 of that $100,000?

A. If I did so testify I will say now that Mr. Wood was investing in the shares from the time of the organization on, and I must have alluded to and intended to allude to that fact that he had invested in the company.

Q. 250 shares at $50 a share was the price at that time, wasn't it?

248 A. That was the price that Mr. Lawrence paid for the shares.

Q. That wouldn't make 25 or 30,000 dollars, would it?

A. No, sir; it would only make $12,500.

Q. Why did you testify in New York—on what information, derived from what source, did you testify in New York that Wood put up 25 or 30,000 of that $100,000—from Wood?

A. Mr. Wood never told me much about what he was doing.

Q. Did he tell you how much he put up?

A. No, sir.

Q. Never?

A. No, sir.

Q. Did Lawrence tell you how much Wood put up?

A. No, sir.

Q. Whoever told you that Wood put up 25 or 30,000?

A. I had an idea that he had invested that amount of money.

Q. What gave you the idea that he had put up 25 or 30,000 of that $100,000? How did you get that idea?

A. From the fact that he had a large amount of shares.

Q. He had 250, didn't he?

A. During 1871 and 1872.

Q. He had 250 only, did he not?

A. That was his subscription on the stock ledger. That would make——

Q. That would make $12,500 only?

A. Yes, sir.

Q. Any other stock that he had after that he bought from outsiders, did he not?

A. Yes, sir; it must have been so from what the stock ledger showed.

Q. That being so, how did you get the impression that he put up 25 or 30,000 of the working capital?

A. I just stated in answer to that I was alluding or intended to allude to his investment in the shares of the company.

Q. That is the only explanation you could make of that testimony, is it?

249 A. Yes, sir; and I didn't know only from that paper there.

Q. You didn't know what the facts were when you testified, did you?

A. Well, I wasn't so fresh on that then——

Q. (Interrupted.) And yet you testified without qualification, didn't you?

A. And all I went by was that statement that I had drawn off from the ledger.

Q. Isn't it true that you didn't know what the facts were when you gave that testimony as to how this 100,000 was put up?

A. I thought I remembered what was the facts about the organization of the company, and I think I did.

Q. You undertook to testify what the facts were without knowing them, didn't you?

A. Well, it wasn't fresh. It was some 13 or 14 years that I hadn't seen any memorandums, diaries, or had any talk with anybody about how that—how much each party did own.

Q. What do you say now, Mr. Whitney, about these three notes and why they were given—how they came to be given?

A. They were given for one-half of the working capital.

Q. Whose was the obligation, as a matter of fact?

A. It was Joab Lawrence's obligation.

Q. And you and Wood were simply endorsers for his accommodation?

A. Yes, sir.

Q. And as a matter of fact——

A. (Interrupting.) They were drawn up in a manner that Mr. Lawrence suggested.

Q. You have already stated that in one of your explanations.

A. I think that is a fact.

Q. So that in truth you now say that instead of Lawrence

250 putting up 65,000 and Wood 30,000 that Lawrence put it all up?

A. I don't know how much Lawrence put up nor how much Mr. Wood put up. Perhaps Wood——

Q. (Interrupting.) Did Wood put up any?

A. Not of that $50,000.

Q. Did he put up any of the balance?

A. Who?

Q. Wood—any of the 100,000?

A. I couldn't say, sir.

Q. Have you any knowledge that he ever did?

A. Only by saying that they had taken up the first fifteen-thousand-dollar note.

Q. Did Wood tell you that?

A. Yes, sir.
Q. That "we" had taken them up?
A. Yes, sir.
Q. Then he afterwards told you they had taken up the second?
A. Yes, sir.
Q. When did he tell you that?
A. In the fall of 1871. I think Mr. Lawrence told me the same. I came up from the mine, and they said they had taken up—in fact I was in Provo in this suit——
Q. (Interrupting.) If I understand, these notes were given at the suggestion of Mr. Lawrence?
A. Yes, sir.
Q. For $50,000 in the aggregate, with you and Wood as endorsers for his accommodation?
A. They were drawn up in the manner the notes state, and each signed a note and the other two endorsed the other, and it was for the accommodation of Joab Lawrence, as I understood it at that time.
Q. Didn't you testify in your deposition given at Salt Lake that Wood had nothing at all to do with the $100,000; that he never put any of it up?
A. He must have paid for that 250 shares.
Q. I am not asking what he must have done. I am asking
251 what you testified to in Salt Lake. Didn't you testify in Salt Lake positively that Wood never put up a dollar of the 100,000 and never had any interest whatever in the property until July following?
A. I may have said so.
Q. Well, didn't you say so; didn't you swear to it?
A. I will correct myself and say that Mr. Lawrence and Mr. Wood had some understanding, but he paid——
Q. (Interrupting.) I don't care about that.
A. Whether he paid Mr. Lawrence or at the bank I am unable to say.
Q. I am asking what you testified in Salt Lake. I read from page 124 in your deposition, speaking of Mr. Wood:
"Q. When did Wood reach here? A. About the 15th day of May, 1871. Q. At whose request? A. At my request. Q. You had known him before? A. Yes, sir. Q. How long? A. Well, sir, 25 years. Q. Was he a man of means? A. Yes, sir; reputed to be; I don't know whether he was or not. Q. Did he pay any money into the bank that day? A. Not that I know anything about. Q. Did he ever pay any money on that bond? A. No, sir; not that I know anything about. Q. Was he interested in the bond at all? A. No, sir. Q. Had no interest in the property, had he? A. No, sir."
Q. Isn't that what you testified to in Salt Lake?
A. If it reads that way.
Q. You testified to that, didn't you?
252 A. If it reads that way, I must have done so.

Q. Is it true that he had no interest in the bond and had no interest in the property? Was that true?

A. He had no interest with me in the bond.

Q. Had he any interest in the bond with anybody?

A. Not that I know anything about.

Q. Had he any interest in the property with anybody?

A. I don't know, sir.

Q. You said he hadn't. You pretended to know then, didn't you?

Mr. BROWN: No; he didn't. "Not that I know of."

"Q. He was interested in the bond, was he? A. No, sir. Q. Had no interest in the property? A. No, sir."

Was that true or don't you know?

A. I don't know that he had any interest in the bond, and I don't know that he had not.

Q. (Interrupting.) Didn't you swear there positively that he had no interest in the bond or in the property?

A. I don't know that I did.

Q. You observe the distinction, don't you, by saying that you don't know a thing and saying that it is not so? Didn't you testify positively in Salt Lake that Wood was not interested in the bond?

A. Yes; I say so now.

Q. And that he had no interest in the property?

A. He didn't have no interest in the property that was in the bond.

Q. And he had no interest in the bond?

A. On May 25th, 1871.

Q. Then isn't it true or don't you mean to be understood as saying that he simply went on these notes as you did, as a mere matter of accommodation to Lawrence?

A. Yes, sir.

253 Q. That is what you swore to?

A. Yes, sir.

Q. That he had no interest in raising this $100,000?

A. No, sir; not that I know anything about.

Q. Simply went on the notes with Lawrence the same as you did?

A. He might have some interest with Lawrence, but I didn't have any understanding with Lawrence.

Q. He was a perfect stranger at that time to Lawrence, wasn't he?

A. I expect he was.

Q. And you were?

A. Yes, sir.

Q. And you two went on this stranger's notes for $50,000?

A. Yes, sir.

Q. Took nothing to secure either one of you, did you?

A. No, sir.

Q. Lawrence had his stock in his pocket?

A. Yes, sir.

Q. He was at liberty to leave the country and dispose of it if he pleased?

A. Yes, sir.

Q. And, taking no steps to secure yourselves at all—the notes of this stranger—you went on the notes of this stranger for $50,000?

A. Yes, sir.

Q. Now, if these notes were simply for Lawrence's accommodation, and you and Wood were endorsing, why didn't you put it into one note of $50,000 and let Lawrence sign it and you and Wood endorse it?

A. I couldn't answer it; that was some of Mr. Lawrence's masterly scheme.

Q. You can't explain it, can you?

A. No, sir; that was a scheme he suggested.

Q. We will get to the scheme after awhile. They are dated
254 the same day, aren't they?

A. Yes, sir.

Q. They are all payable on demand, aren't they?

A. Yes, sir.

Q. Now, can you give any reason why, if the facts were as you state them, you didn't simply give one note of $50,000 signed by Lawrence and endorsed by you and Wood?

A. I cannot.

Q. Didn't you ask Mr. Lawrence—say to him something like this: "Why, what is the sense in making three notes here on demand? Why not just put the one note in $50,000, and we will endorse that?"

A. Why didn't I say so to Mr. Lawrence?

Q. Didn't you say something of that kind?

A. No, sir.

Q. Didn't ask for any explanation?

A. No, sir.

Q. If you were simply there as accommodation endorser and maker for Lawrence, how does it happen that you came to execute in your own name as maker the largest of the three notes?

A. I didn't know it until the note was shown to me in New York.

Q. You didn't know it?

A. No, sir; I didn't know it. I didn't know which note I signed.

Q. You can't explain, then, how it happened?

A. No, sir.

Q. How you came to get your name on the $20,000 note?

A. I don't know why I happened to get on the biggest one.

Q. These are the three notes, are they (showing papers to witness)?

A. Yes, sir.

Q. You never paid that $20,000 note, did you?

A. No, sir.

Q. Nor any part of it?

A. No, sir.

Q. Nor any part of either of the others?

A. No, sir; and I never saw the note signed by me—this is the one I made—until it was shown to me in New York, in 1888.

255 Q. That is the $20,000. Do you mean to say that doing business with a man you had been acquainted with but a few days, as you were with Mr. Lawrence at that time, that you signed notes and delivered to him without reading them or knowing what you were signing?

A. It appears that I had forgotten and didn't know that I had got on the biggest note.

Q. Do you mean to say that doing business with a comparative stranger, as Lawrence was to you then—you had known him but a few days——

A. Mr. Lawrence was reputed to be very wealthy and a first-class business man, and I had confidence in Mr. Lawrence and done that to accommodate him.

Q. Will you wait until I get my question and then answer it? Do you mean to say that doing business with a man that was a comparative stranger to you, that you had met for the first time about the middle of May, that you signed notes and without reading them delivered them into his possession?

A. I did in that instance, and I had lots of confidence in Mr. Lawrence as a business man, having met him and been with him from Chicago, and knowing Mr. Lawrence and knowing what his business had been since 1856.

Q. You say you never saw the man to speak to him in your life until you met him in Chicago, in the middle of May, 1871?

A. Yes, sir.

Q. And you mean to say on the 25th of that month you signed a note for $20,000 and delivered it to Lawrence without knowing for what amount it was?

A. At his request I signed——

Q. (Interrupting.) Didn't know what amount it was?

256 A. Well, I had forgot, if I did. I probably looked at the note at the time, but I forgot which it was.

Q. Aren't you satisfied you did look at the note?

A. I may have, but I can't—I wouldn't swear to it.

Q. Have you any doubt about it?

A. I usually look to see what I am signing.

Q. You don't believe you did in that instance?

A. I possibly may have done it.

Q. I say don't you believe that you did?

A. I couldn't say whether I did or not.

Q. If you did, how did it come that you got your name on the largest note?

A. I couldn't say.

Q. As maker?

A. I couldn't say how.

Mr. DICKSON: We offer these in evidence.

Mr. BROWN: I will make a general objection that they are immaterial and irrelevant.

The COURT: They may be admitted.

Said papers were marked respectively Exhibits 4, 5, and 6, June

28, 1890, third district court. Whitney *vs.* Fox. F. E. McGurrin, stenographer.

Q. Now, Mr. Whitney, about the conversation which you had with Mr. Lawrence in November, 1871, when you and Wood delivered over the stock to him—what date was that as nearly as you can fix it?

A. That was between the 19th day of November, after he returned from Detroit——

Q. (Interrupting.) Oh, no; 1871, I am speaking of, when you delivered the stock to him.

A. What time of year was it?

257 Q. Fix the date as nearly as you can when you delivered that stock to him and had the conversation with him.

A. Some time in November, I said.

Q. Can you fix it any nearer than that?

A. No, sir.

Q. Didn't you keep a diary at that time?

A. I forget whether I did in 1871 or not.

Q. Didn't you testify when you gave your deposition in Salt Lake that you kept a diary in those years?

Q. I had a diary in 1872 and 1873 and 1874.

Q. Haven't you any of 1871?

A. I have got a book that I kept in 1871, but I don't think I made a diary of it.

Q. What did you make of it?

A. I had—what is in that book is mostly relating to the trials in Provo when I went there, and——

Q. Daily entries in it?

A. No; there may be some.

Q. Do you say, then, that you did or did not keep a diary in 1871?

A. I kept a memorandum of what those lawsuits were doing.

Q. Did you or did you not keep a diary in 1871?

A. I didn't have, in 1871, what I call a regular diary.

Q. Where is the book that you have reference to?

A. I think it is over in Mr. Brown't office.

Q. I would like you to bring it in at two o'clock. When did you commence keeping a diary?

A. I have a diary in 1872.

Q. What time does it commence?

A. First of January.

Q. So that you cannot give us the time when you delivered this stock to Lawrence?

A. Not the date.

Q. Any more nearly than you have stated it?

A. No, sir.

258 Q. Did you keep a diary to 1871?

A. No, sir; never kept any diary until——

Q. (Interrupting.) Who was present when you had this conver-

sation in November, 1871? I am speaking now, not 1872, when you had this conversation with Mr. Lawrence.

A. About delivering the stock to Mr. Lawrence?

Q. Yes.

A. Mr. Wood was present.

Q. And Mr. Lawrence and yourself?

A. Yes, sir.

Q. Anybody else?

A. No, sir; not that I remember.

Q. Where was it?

A. In the office of the Eureka Mining Company of Utah.

Q. About what time in the day was that?

A. I couldn't say.

Q. About 9 o'clock in the morning or 2 o'clock in the afternoon?

A. I couldn't say whether it was before or after noon.

Q. You have a very good memory, haven't you?

A. Well, the time is so far back that I couldn't say now whether it was in the forenoon or in the afternoon.

Q. You have undertaken here to give dates of transactions that happened about that time, haven't you, in your direct examination?

A. Not positive dates, unless I have something to refresh my memory.

Q. And the hour of the day of certain conversations you gave in your direct examination?

A. In 1872 I did.

Q. That is only a year later.

A. Yes.

Q. And the exact language used by parties at that time?

A. As near as I remember.

Q. Give us that conversation again, please.

A. Which?

Q. The one in November, 1871.

259 A. Mr. Lawrence says to me—he says, "Now the stock is getting of some value," and he says, "Either one of us might sell out and leave the other here—setting here to further this institution and run it," and he says, "I have had some talk with Mr. Wood. We have talked about this matter to ourselves and we thought you might dispose of your stock and leave us here," and I says to Mr. Lawrence, "Well, now, if you think that I will step down and out and leave you here after inviting you to come here from Chicago as I did, I will just take my shares and put them right in your possession now, and if there is any trade—any desire to sell and step down and out and go away—why you will know of the trade that I have in view, because I will have to ask you for the shares, and I will say right to you now if there is any trade comes up you can make it yourself. You are a smarter man than I am and you are a better trader, and any trade that you make for yourself you can make for me in proportion as it is in your hands now." And Mr. Wood after that says, "I will do the same thing, Mr. Lawrence, if you have any fears with me."

Q. Is that the whole conversation?

A. We delivered the shares to him and he put mine in an envelope and marked the number of shares received on the back of the envelope.

Q. Do you pretend to say, Mr. Whitney, that you can remember any such conversation as that?

A. Yes, sir.

Q. Eighteen years ago?

A. Yes, sir.

Q. Did you make any memorandum of it?

A. No, sir.

Q. Was there any memorandum made of it to your knowledge?

A. I don't remember that I made any memorandum of it.

260 Q. Can you undertake to give a word of any other conversation which you had with anybody that year—a single word? Is there a conversation that you had that year with anybody respecting which your memory is not today a perfect blank?

A. No, sir; I have related the conversation that Mr. Lawrence made to me and desired me to go and talk with Mr. Hussey about.

Q. I am speaking now outside of Lawrence; I know you testified to several conversations with Lawrence and what was said to him and you. Isn't your memory today a perfect blank as to any conversation you had with any other man that year?

A. No, sir.

Q. Who—what conversation did you have with any other man?

A. I remember that soon after the organization of this company that we purchased an interest in what is called the Utah Smelting and Milling Company; I was made one of the officers of that organization.

Q. When was that?

A. That was probably within six weeks after the organization of this company—this Eureka Company.

Q. Go ahead.

A. And that we had a conversation that——

Q. (Interrupting.) Who?

A. Mr. Richards and Mr. Lawrence and myself, with the owners of the Utah Smelting and Milling Company.

Q. Who were they?

A. There was a man by the name of Jones.

Q. What is his other name?

A. I forget; George W. Homan, of Omaha, and a man by the name of Clarkson.

Q. What is his other name?

A. T. W. Clarkson, I think.

Q. Who else?

A. I don't know as any others.

Q. Now, can you remember what Mr. Homan said in that conversation—do you remember anything that he said?

261 A. Mr. Homan sold an interest.

Q. Can you remember anything that he said?

A. I don't know that I can.

Q. Can you remember anything that Clarkson said?

A. Clarkson was secretary of the company.
Q. Can you remember anything that he said?

Mr. JUDD: May it please your honor, I submit if this cross-examination is proper. Why go off after transactions he had with other people that have no relevancy to this matter whatever?
Mr. DICKSON: To test his recollection.
The COURT: To test his recollection.
Mr. JUDD: He cannot test his recollection as to wholly irrelevant matters. He must confine himself to the issue when he is testing his recollection.
The COURT: Of course it is proper for a party, in order to test the recollection of a witness, to inquire as to his recollection as to other matters along about the same period of time. Of course the probability that a witness will remember other matters occurring about the same time would depend upon what they were and their importance to him and so on; but that only goes to the weight that should be given to his failure to recollect other conversations at that time, and within reasonable bounds I think it is proper. He does not ask him specifically to state what he said on any particular subject.
Mr. JUDD: I don't care anything about it only for the purpose of confining this examination to the proper subject of inquiry that is before your honor and getting to an end of it after awhile.
262 The COURT: This is not proving anything—simply for the purpose of testing the recollection of the witness. He asks if he remembers any conversation with any person along about that time.

Q. Do you remember anything that Jones said in that conversation—the other man?
A. No, sir.

Mr. JUDD: We except to that, if the court please, and take a distinct ruling on it. I undertake to say that there is no rule that allows him to go on and have detailed other conversations wholly independent of the matter in issue here.
The COURT: Note an exception.

A. Mr. Jones, as I understand and believe now—understood at that time and believe now—was down to Homansville erecting the stack—superintending and erecting the stack for those furnaces.
Q. Do you remember anything that you said yourself?
A. Well, if you will let me say now, in answer to what Mr. Homan said, the conversation with Mr. Homan—he is the principal man that the contract was made and the trade was made with—he was in the office, and——
Q. (Interrupting.) You say you don't remember anything that Homan said, don't you?
A. I remember he was in the office and desired to sell and interest to Mr. Lawrence.
Q. Didn't you state that you couldn't remember anything that Homan said in that conversation, just a moment ago?

A. Am I permitted to correct myself?

(Previous testimony on this point read by the reporter.)

Q. How much stock did you deliver to Mr. Lawrence at that time—that is, in November, 1871?

A. How much stock?

263 Q. Yes.

A. Oh, I must have delivered to him 550 or 560 shares all during the time.

Q. What has refreshed your recollection since you testified in New York, when you said you delivered between three and four hundred?

A. Having seen a statement that I made from my book that I prepared, for 1871, of the number of shares that I received from the property that I had in the bond and for my subscription, and the few shares that I got from Mr. Richards for money advanced to him.

Q. That is the book you referred to that is in Mr. Brown's office?

A. Yes, sir.

Q. You remember that you did testify in New York that you delivered between three and four hundred shares?

A. Yes, sir; I didn't know how many shares I had then delivered.

Q. How long after you delivered that stock was it before Mr. Lawrence left here to go to England?

A. I think he left here in March following.

Q. March, 1872?

A. Yes, sir.

Q. And when did he return?

A. He returned in August of that year.

Q. You gave the date, I think—the day in August—didn't you?

A. I may have done so.

Q. What was it?

A. I couldn't state positively now without referring to my memorandums.

Q. Where is your memorandum?

A. They are in Mr. Brown's office.

Q. You didn't bring the diary with you—of 1872?

264 A. 1872? I guess I have that here. (Produces book.) This is the diary of 1872.

Q. When did Lawrence return?

A. He returned on the 21st day of August.

Q. What entry have you there?

A. "Lawrence"—"Joab Lawrence arrived."

Q. Written in what—pencil?

A. Yes, sir.

Q. "Joab Lawrence arrived?"

A. Yes, sir.

Q. Where did you meet him?

A. I met him in the office of the Eureka Mining Company of Utah.

Q. Who was present?

A. Mr. Wood and I, and Mr. Lawrence was there in the evening.
Q. Anybody else?
A. No, sir.
Q. What conversation did you have with him then about the stock?
A. I don't think we had any.
Q. None at all?
A. He had possession of our stock at that time.
Q. Didn't you have any conversation with him?
A. I don't think we did.
Q. Didn't he tell you what he had done with it?
A. No, sir; I don't think he had done anything with it.
Q. Hadn't he made a loan—raised money at that time?
A. Yes; he told me that he had borrowed some money at Ypsilanti.
Q. Just give us that conversation. That is what I want. What did he say?
A. He stated that he had stopped in Detroit and had seen Mr. Griffith and Mayhew and Mr. Lee, and was introduced to Mr. Ward, and they seemed to want to buy some interest in the Eureka
265 Mining Company. He told them he didn't think he wanted to sell anything, but that he wanted to borrow some money. That was the conversation he was relating to us.
Q. I want to know it.
A. And that he had been out to Ypsilanti with Lee and Mayhew and had borrowed $25,000 and had put up $25,000 at par value of the Eureka Mining Company of Utah, and he had brought back with him $23,587.50 and had put it—was going to put it in the bank the next day, which he did, as I subsequently learned, and he says, "Now, I will tell you what I wanted—what I telegraphed for you to pass that check for." He says, "We want to call a meeting of the trustees and vote ourselves a salary, $20,000," and he says that "I guaranteed to Mr. Ward—he having asked me if there was any indebtedness on the mine—I guaranteed to Mr. Ward that it should not exceed $50,000, not being able to tell him how much the indebtedness was then."
Q. Anything further?
A. He said that "We will call a meeting of the trustees and vote ourselves a salary of $20,000."
Q. That is the conversation?
A. Yes, sir.
Q. Don't you know that is not true?
A. No, sir.
Q. Do you mean to say that on the 21st of August you had that conversation with Lawrence?
A. In the office of the Eureka Mining Company, on that evening, after he had his supper, he came over in there and we were sitting in there together.
Q. On the evening of the 21st of August?
A. Yes, sir; as nearly as I now remember, and that is what my memorandum says, the day he returned.

Q. Don't you know that that is not and cannot be true?

A. I do not.

266 Q. Don't you know that the trade was never made with Ward until October?

A. Yes, sir.

Q. And don't you know that you have testified twice over in this same proceeding that you did not get a telegram from Lawrence to pass a check until the third day of October? Now, how could you have had that conversation with him on the 21st of August?

A. I will correct myself in that particular now, Mr. Dickson.

Q. Now, come back and give us the conversation of the 21st of August.

A. I think that conversation about the guaranty was——

Q. (Interrupting.) Wait a minute—stop. Begin again, now, and give us the conversation of the 21st of August.

A. I have confounded the conversations of his return on the 22nd of August and his return after making the trade with Mr. Ward, in regard to——

Q. (Interrupting.) Go on, now, and give us the conversation of the 21st of August; begin again.

A. He stated that he had stopped and seen Mr. Griffith in Detroit on his way, and Mr. Mayhew, and then introduced to Mr. Ward, and that he had borrowed the money——

Q. (Give the whole conversation.)

A. That he had borrowed $25,000. I have got a little ahead of my——

Q. (Interrupting.) Just take time; start again now and give us the conversation of the 21st of August; begin at the beginning.

A. He stated that he had stopped in Detroit on his way home and had met Mr. Griffith and Mr. Mayhew and Mr. Lee, and that they had introduced him to Mr. Ward and Mr. Ward seemed to want to buy some property—buy some property in the Eureka mine—and that he said to Mr. Ward that these—Mr. Griffith

267 and Mr. Mayhew have been out there, and they don't know anything about mines—about a mine—mining property, and he says, "Now, Mr. Ward, if you want to buy any interest in that mine, why you had better send out an expert and make a thorough examination," and he told Mr. Griffiths and Mr. Mayhew, he said, that he wanted to borrow some money. He didn't care so particular about selling anything, but he wanted to get some money, and he went out to Ypsilanti, Michigan, with Mr. Lee and Mr. Mayhew and borrowed that money.

Q. Just state what he said.

A. Borrowed $25,000 on his notes.

Q. Whose notes?

A. On his own notes, and had put up $25,000 at par value of the Eureka stock to secure the payment—as security—the notes being endorsed by Mr. Lee and Mr. Mayhew; he stated all those facts to us that evening.

Q. What else did he say to you?

A. And I think that—then he said that he expected Mr. Ward to send out an expert.

Q. What else, if anything?

A. Then he related his journey in Europe, as he had written.

Q. What else about this transaction—about this loan?

A. I think that is all at that time.

Q. Didn't he state how much money he had brought back—how much he had raised on the $25,000?

A. Yes, sir; he said he brought back $23,587.50 after discounting the notes.

Q. Do you undertake to state to the court that you remember that on the evening of the 21st of August, 1872, Lawrence said that he brought back $23,587.50—do you remember that?

A. I think I do.

Q. You testify that you remember——

268 A. (Interrupting.) I think he stated exactly to a cent what he got out of discounting the notes.

Q. You testify, do you, that you, as you sit there now, remember of hearing Lawrence say that he had brought back $23,587.50?

A. I state as near as I now remember.

Q. Do you remember that, or do you not, that that is what he said?

A. I have stated what I think I remember he said.

Q. Well, is that the whole conversation, now?

A. It is all that I think of now; of course there is lots more conversations about general matters.

Q. I mean this one thing; I don't care about the other things; that is all he said about this transaction?

A. I couldn't say whether it is all or not.

Q. Is it all that you have any memory of?

A. It is what I now remember.

Q. Then he didn't say what stock he put up to secure the $25,000 note, whether it was his own stock or yours?

A. He didn't say in whose name the stock was issued.

Q. Simply said he put up $25,000 par value of the Eureka stock, was what he said?

A. Yes, sir; he had put up $25,000 at par value of the Eureka stock, the stock being put up at $100 a share.

Q. He didn't ask your consent or endorsement of what he had done?

A. No, sir.

Q. Nor indicate to you in any way that he had used your stock of Wood's as collateral?

—. ——.

Q. Did you ask him?

A. I didn't ask him.

Q. Did you have any subsequent conversation with him

269 about that before he went away again?

A. Before he returned to Detroit?

Q. To Detroit.

A. I don't remember.

Q. Can't recall any?

A. No, sir. Whenever I was here in the office of Mr. Wood and Mr. Lawrence—I was in there all the time I was in town, but I was at the mine most of the time that year, and if I was here there would be general talk about matters.

Q. Can you recall any conversation that you ever had with Lawrence about that loan other than the one that you have testified to prior to the time when he went back to Detroit?

A. No, sir.

Q. Did you have any talk in the meantime—that is, from the 21st of August, 1872, until he went back to Detroit again—with him about your stock?

A. No, sir.

Q. Or hear any between him and Wood?

A. No, sir.

Q. Now, when did he go back?

A. If you will permit me to refer to my diary?

Q. Yes.

A. (Referring to book.) On Sunday, the 29th day of September, Lawrence left for Detroit.

Q. Just read the entry of that day.

A. "Lawrence left for Detroit."

Q. What else is there?

A. Well, this is a special, a letter wrote to A. M. H.

Q. Have you anything else under that date?

A. No, sir.

Q. Except that Lawrence left for Detroit?

A. No, sir.

Q. Where were you on the day he left; here in the city?

A. I couldn't say. Let me see if there is anything on this diary.

Q. You have no entry under that date except what you
270 have read. Don't you remember whether you were here to see him off or not?

A. I will answer that directly.

Q. Well, first. You can refer to your diary afterward. Now, I want your independent recollection.

A. I don't remember that I was.

Q. Close the book for a moment, please, and refer to it afterward. Is your memory now a perfect blank as to whether you were here and saw Lawrence off or not?

Mr. JUDD: I except to that question, if your honor please, as not being a proper way of examining a witness.

The COURT: It seems to me that is about the same as asking him whether he has any independent recollection of his own.

Q. Is your memory as you sit there a perfect blank as to whether you were here and saw Lawrence off or not?

A. I don't remember that I was here, whether I was or not.

Q. Have no memory about it at all?

A. No, sir; only from this entry here. Possibly I was down to Eureka.

Q. What correspondence, if any, did you have with Lawrence after he left here on the 29th of September and up to his return again, in October?

A. I couldn't say without seeing letters that were written.

Q. What is that?

A. I couldn't tell you unless I could be shown the letter that was written.

Q. Did you receive any letter from him during that interval?

A. I couldn't remember now whether I did or not, but I think I did; when he was in Detroit I think I was; I think he wrote letters here.

271 Q. How many letters do you think you got from him?

A. I couldn't say.

Q. More than one?

A. I couldn't answer.

Q. Do you think you got more than one?

A. I don't know.

Q. No memory about it?

A. No, sir.

Q. Have you any memory of having got one?

A. I remember of either receiving a letter myself or one written to Mr. Wood that came to the office.

Q. Do you know where that letter is?

A. No, sir.

Q. Do you know what it was about?

A. It was——

Q. (Interrupting.) Just answer the question. Do you know what it was about?

A. I think I remember what he said in that letter and what it was about.

Q. What was it about?

Mr. BROWN: I object to his examining as to contents of letters not laid before him.

Mr. DICKSON: He says he don't know where the letter is.

Mr. JUDD: Possibly it is one of these that have been introduced.

Mr. BROWN: Anyway, I object to his examining as to the contents of letters not introduced.

Mr. DICKSON: All right.

Q. Did you receive any other communication from him except by letter?

A. There was a telegram sent by him?

Q. To you?

A. To me or Mr. Wood. I was in the office at the time.

Q. Don't you know to which it was sent?

A. I don't remember now. It came to the office there,

272 and said—I think it came to me; might have come to Mr. Wood, in relation to passing this check.

Q. You gave the date of that telegram, I think?

A. I don't know that I did.

Q. As being October 3rd?

A. I don't remember whether I did or not.
Q. Didn't you in one of your former depositions?
A. I don't remember.
Q. What date was it, now, would you say?
A. I wouldn't say. I couldn't remember.
Q. You didn't hold any office in the company except that of vice-president?
A. That is all.
Q. Mr. Wood was the secretary?
A. Secretary and treasurer.
Q. The man who drew the checks in the absence of Mr. Lawrence, I suppose?
A. I don't think Mr. Wood ever drew a check—filled out a check.
Q. Who drew them in the absence of Lawrence—you?
A. There is one check there, 279——
Q. (Interrupting.) I am not asking about any particular one.
A. I find that I drew.
Q. Who drew checks in the absence of Lawrence?
A. I drew one.
Q. Who did it, as a rule—whose business was it—you were down to the mine principally, weren't you?
A. I happened to be here when that check was drawn.
Q. But, as a rule, you were down at the mine?
A. Yes, sir.
Q. Whose business was it to draw checks in Lawrence's absence?
A. It might have been Wood's business, but he never done it that I ever saw. I never knew that Mr. Wood filed out a check.
273 Q. And yet the telegram, you say, came to you from Lawrence?
A. It might have come to Mr. Wood. I disremember.
Q. Did you not say that it came to you?
A. Yes, sir; I say that I thought it did, and I have no reason to doubt it now.
Q. Did I understand you that it was check 279 that you drew?
A. I think it is 279; it is a check that I drew for $1,700, payable to Lloyd Rawlins—that is, that I filled it out. I think that is my handwriting.
Q. Who signed it?
A. Joab Lawrence.
Q. You didn't sign it?
A. No, sir.
Q. But you filled up the body of it?
A. Yes, sir; those checks were all signed by Mr. Lawrence when he went away.
Q. Now, Lawrence returned——

Mr. BROWN: I think he was entitled to see it before stating the numbers. I see he is mistaken; it is 284, isn't it?

Mr. MARSHALL: Whom did you say it was payable to?

A. Lloyd Rawlins.
Q. What amount?
A. As near as I can remember now, seventeen hundred dollars.
Q. There is a check to Lloyd Rawling, fifteen hundred dollars, check 295.

Mr. BROWN: That is not the one.

Mr. MARSHALL: There is one to Lloyd Rawlings, $1,200, 283. Which one of these checks was it that you filled out?
A. The photograph shows the stub.
Mr. MARSHALL (showing checks to witness): Check 283?
A. That is mine.
Q. 295?
A. That is Joab Lawrence's.
274 Mr. DICKSON: You filled out 283, did you?
A. Yes, sir.
Q. When did Mr. Lawrence come back again?
A. Mr. Lawrence returned—it was October 18th.
Q. You can just close that book, and you can refer to it when you have occasion. Where did you meet him?
A. I can't say whether I met him at the depot here or whether I went down to Ogden. I went to Ogden and met him on one of his return trips.
Q. Can't you remember?
A. No, sir.
Q. Didn't you testify on your direct examination here yesterday that you went to Ogden to meet him?
A. Yes, sir.
Q. Didn't you testify so in New York also?
A. I couldn't say.
Q. Cannot remember what you testified to there?
A. I couldn't say that I said I went to Ogden.
Q. You can't remember whether you testified in New York that you went to Ogden to meet him on that occasion?
A. No; I can't remember now.
Q. You can't remember now whether you did go to Ogden to meet him?
A. I went to Ogden to meet him, I said, on some trip on his return here.
Q. I say, can you remember that you went to Ogden to meet him on this trip when he came back on the 18th of October?
A. Not without referring to this diary.
Q. What conversation did you have with him when you met him at Ogden, if you met him there?
A. He related what his trade was that he had made.
Q. State what he said when you first met him.
A. He said that "I have made a trade with Captain Ward,
275 and I have delivered to him two thousand shares of the capital stock of the Eureka Mining Company of Utah and received a lot of chips and whetstones, consisting of some mining shares and rolling-mill stock and real estate in the city of Detroit,

and some land out back of Detroit," which he hadn't seen, and that he got this note discounted he received through Ward. He received a note from Mr. Ward of thirty thousand dollars, and he got it discounted at Mr. Ward's bank, and the note was drawing eight per cent. interest, and he didn't tell me what the discount was, whether than he got it discounted at eight per cent.—I don't remember now—and that he had taken ten thousand dollars received from the discount of that note and paid one of the notes at the Ypsilanti bank. I remember that distinctly.

Q. Anything else?

A. I don't remember now anything.

Q. He told you that on the way down from Ogden or while you were there?

A. I haven't said that I went to Ogden at that time.

Q. Refer to your diary and see.

A. (Witness referring to book.) "Went down to Ogden to meet Lawrence, who returned from the East." That is the entry there that I have.

Q. That is of the 18th of October; so by referring to your diary you remember now that you did go to Ogden to meet him?

A. Yes, sir.

Q. Did you have this conversation with him at Ogden?

A. Coming down on the train, and we had some conversation as soon as we got to the Eureka Mining Company's office; he related the same thing to Wood before me.

Q. Anything further said in the conversation in the office when Wood was present than that he stated to you on the train?

276 A. He might have said a great many things in regard to what Mr. Griffith had said and what he had done and what Mr. Lee said; he said that he had given the 160 acres of land to Mr. Griffith and that he had given Griffith and Mayhew 160 shares of stock in the company for the work they had done in assisting in this trade.

Q. Anything else that you remember?

A. I don't recall the conversation.

Q. What did he say he had done? Just state again as fully as you can recall what Lawrence said on that occasion in the office to you and Wood as to what he had done with the Ward $30,000 note.

A. I stated before that he had taken from Mr. Ward's bank and had got it discounted, and that he used ten thousand dollars of the money to pay a note in the Ypsilanti bank.

Q. Go on. What else did he say about that note and the proceeds of it?

A. I don't remember.

Q. Didn't he tell you how much he had discounted it for?

A. I don't remember that he did.

Q. Didn't you testify in New York that he did?

A. I can't say, sir.

Q. And didn't you testify there that he told you and Wood not that he had taken ten thousand dollars of it to take up the note in the Ypsilanti bank, but that he had got it discounted for twenty-

seven thousand dollars and paid $23,587.50 into Wells-Fargo's bank for overdrafts, and the balance, with the exception of three thousand dollars, he had taken to liquidate the expenses of his trip to
277 Europe and Detroit, and that he divided the remaining two thousand dollars with you; isn't that what you swore to in New York?

A. I may have stated something like that in New York.

Q. Was it true?

A. I find now that the fact is that the company voted him his expenses to Europe at a subsequent meeting, which was two thousand dollars, and the company paid him.

Q. Didn't you testify in New York as follows about that conversation: "Upon his return from Detroit about that time he related to us the kind of trade he had made with Captain Ward, stating that he didn't know whether it was a good trade or a bad one, stating that he had delivered to Captain Ward two thousand shares of the stock that he had been carrying around and with it a good many shares of mine and many of Mr. Wood's and a good many of his own—this pool stock that he had kept since we first delivered it to him in 1871, and stating what he had received. He had received thirty thousand dollars in Captain Ward's promissory notes, drawing eight per cent. per annum, payable in one year. Those he had got discounted at Captain Ward's bank, receiving therefor $27,000." Didn't you swear that Lawrence told you and Wood that?

A. Yes, sir.

Q. Was it true?

A. It is relatively correct.

Q. Why is it that you say that you don't remember how whether he told you what he realized on the note or not?

A. You asked me what discount he had made and I told you that I didn't remember.

Q. Didn't I ask you if he told you what he discounted the notes for and you stated you didn't remember, didn't you? Now,
278 if you don't remember now, how did you come to testify in New York that he told you he had received $27,000 on those notes?

A. The notes he said was drawing eight per cent., and I don't remember as he stated that he had to pay any more than eight per cent. to get them discounted or not. I don't know as there was any such conversation, but he said he brought back $27,000, as I remember now.

Q. He did tell you. That he had also received from Captain Ward a piece of real estate in the city of Detroit called the Mansion house and three lots—two adjoining lots and the one the Mansion house stood upon, describing what kind of property that was. He had also received shares in the Wyandotte Rolling Mill Company, of Wyandotte, Michigan. He had also received shares in the Silver Eyelet Mining Company of Lake Superior, and he had also received a farm of one hundred and sixty-odd acres in Oakland county, Michigan, stating that of the twenty-seven thousand dollars realized

from the notes that he had received from Captain Ward and had discounted at his bank he had paid twenty-three thousand five hundred and eighty-seven dollars and fifty cents of that into the banking-house of Wells, Fargo & Company to the credit of the Eureka Mining Company made. Didn't you testify to that in New York?

A. Yes; that is relatively correct.

Q. Was it true?

A. That conversation didn't occur on that evening.

Q. Was it true?

A. Of his return?

Mr. BROWN: Was that true?

Mr. DICKSON: Is it true that Lawrence told you and Wood that he paid, of the twenty-seven thousand dollars, twenty-three
279 thousand five hundred eighty-seven dollars and fifty cents into the banking-house of Wells, Fargo & Company to the credit of the Eureka Mining Company to settle some overdrafts that company had made?

A. That is subsequent conversation that he told me when he made our settlements.

Q. When did he tell you that?

A. It was on the—well, between the 18th and the 20th, I should judge, as near as my memory serves me now.

Q. 18th and 20th of October, 1872?

A. Yes; between that and the 4th of November.

Q. 1872?

A. Yes, sir.

Q. Then he told you some time between those dates that of this $27,000 he had paid $23,587.50 into the banking-house of Wells, Fargo and Company?

A. He had used that—that much, he said, to pay an overdraft, as I understood.

Q. But when he first came back and when you first had the conversation with him in the office the evening of the 18th of October when Wood was present he then told you that he had taken $10,000 of it to take up one of these notes in the Ypsilanti bank?

A. Yes, sir.

Q. Well, then, when afterwards, within a few days, he told you that he had taken $23,587.50 of that money and paid into Wells-Fargo's bank, didn't you challenge his attention to the former statement that he had made, namely, that he had paid——

A. (Interrupting.) He stated, inasmuch as he had paid $23,000 into the bank, he wanted us to assume that in proportion with him, as we had agreed to take the interests in the Ward venture.

280 Q. But didn't he say to him when he told you that, "Why, Mr. Lawrence, what do you mean? You told me and Wood the night you came back here that you had taken $10,000 of that to take up one of your notes."

A. Yes, sir.

Q. "Now, you tell us that you took $23,587.50 of it and paid into Wells-Fargo bank to meet overdraft. What do you mean?"

A. It was to represent the $23,000 that he had previously advanced, and it was so understood that we should assume one-eighth of that loan *at* that he had made and he keep this money.

Q. Didn't you see that he was telling you conflicting stories about that matter? He came back, for instance, on the evening of the 18th and said to you, "I took $10,000 of that money that I got on the Ward note and paid into the Ypsilanti bank to take up one of my own." Then a few days afterwards he remarked to you and Wood that he had taken $23,587.50 of it and paid into Wells, Fargo & Company's bank. Now, why didn't you ask him what he meant by telling you those two stories?

A. To the credit of the company?

Q. To the credit of the Eureka Mining Company. Why didn't you ask him to reconcile those two statements?

A. Well, if I made a statement I would have to be understood and do now that Mr. Lawrence, knowing that Lawrence had borrowed money in Ypsilanti and had placed it to the credit of the company to settle overdrafts, when we came back with this Detroit money, having received, as he said, $27,000 through the discounting of Mr. Ward's note, that—and we had agreed in the conversation with him about the settlement of the claim of this Ward
281 venture and land that he obtained to take one-eighth, inasmuch as he had delivered one-eighth of our shares and the money he had received and had left from the Ward transaction was to be applied to himself, and we assume that indebtedness from the Eureka Mining Company to him, whether he deposited that money in Wells, Fargo & Company, any portion of that $27,000, to his own credit or of the company I know not.

Q. Of course not. What I am getting at is your testimony. If Lawrence when he came back here told you and Wood that he had taken $10,000 of that money and paid into the Ypsilanti bank to take up one of his notes, why didn't you testify as you did here, as I read to you?

A. Perhaps it escaped my memory at that time. I couldn't recall.

Q. Didn't you also testify here as follows: "Stating that of the $27,000 realized from the notes that he had received from Captain Ward and had discounted at his bank he had paid $23,587.50 of that into the banking-house of Wells, Fargo & Company to the credit of the Eureka Mining Company to settle some overdrafts that the company made; that he also settled with himself for his European expenses on his trip to Europe, some little expenses going to Detroit, and had two thousand dollars left." Didn't you testify to that in New York that that is what Lawrence said to you?

A. He said that he had $2,000 left out of this Ward money after we had agreed to take the interest; that he had a loan, and he distributed the $2,000, paying me $250, and subsequently paid to Mr. Wood—I don't know when he paid to Mr. Wood—$250.

282 Q. You testified in New York that Lawrence told you and Wood that after disposing of this $23,587.50 that he told you that he had settled with himself for his European expenses on

his trip to Europe and some little expenses going to Detroit, didn't you?

A. I may have said so.

Q. Was it true?

A. I know it was allowed.

Q. Was it true that he said anything of that kind to you as you testified?

A. Well, I won't say now that he said that to me.

Q. Why did you testify to it, sir?

A. But I will say that we paid him—the company allowed——

Q. (Interrupting). That is not the question. Why did you testify in New York that Lawrence stated to you and Wood that he had settled with himself for his European expenses and his expenses to Detroit out of that Ward money if he didn't say it?

A. It was—my idea was—having the knowledge that he had been paid $2,000 of that money—something like that amount—we voted it in a meeting. I find now and I had an idea that he took it out of that.

Q. Since you gave your testimony in New York you have discovered from an examination of the books that that was not true?

A. Yes, sir.

Q. That the company voted him the money afterwards?

A. Yes, sir.

Q. But before you had found that out from the books you testified in New York that Lawrence had said this to you and Wood, didn't you, that he had settled with himself for his European expenses? Now, why did you say that?

283 A. Well, I didn't remember——

Q. (Interrupting.) If you didn't remember, how did you undertake to swear to it?

Mr. BENNETT: As a positive fact?

A. I think at the time when I was in New York, not having looked over these books, and the books never were there I could see them, that I was stating as I remembered the transaction at that time.

Q. Before you gave your deposition in Salt Lake you had seen Wood's deposition, hadn't you?

A. No, sir—yes, sir.

Q. And Wood testified, did he not, that Lawrence said that he had taken ten thousand dollars to take up one of his notes in the Ypsilanti bank?

A. Yes, sir.

Q. And brought the other money back?

A. Yes, sir.

Q. And after you had seen Wood's deposition you were examined again in this matter at Salt Lake, weren't you?

A. Yes, sir.

Q. And when you were examined at Salt Lake you swore just as Wood did, didn't you?

A. My memory had been refreshed.

Q. When you were examined at Salt Lake, didn't you, instead of

testifying that Lawrence said he had taken $23,587.50 and paid it into Wells-Fargo's bank and settled with himself for his European expenses and his expenses to Detroit,— didn't you in Salt Lake testify that he said to you and Wood that he had taken ten thousand dollars to take up his note in the Ypsilanti bank and brought the rest back with him?

A. I may have said so.

Q. Didn't you say so?

A. I may have said so; I can't say what I said now.

284 Q. Don't you remember what you testified to here in Salt Lake last year?

A. I might have possibly said so.

Q. Didn't you also testify in New York on this same subject:

Q. "On that occasion did he tell you how much he had realized from the discount of the $30,000 of notes received from Ward? A. On his return from Detroit, after having made the trade with Mr. Ward, he stated he received from Mr. Ward's bank $27,000. Q. On that occasion did he state to you how he had used that $27,000? A. Yes, sir. Q. And from that $27,000 he had paid $23,587.50 to Wells, Fargo & Company to pay overdrafts the company had made. A. Yes, sir. Q. Didn't you know that he had not done so? A. No, sir; I did not."

Mr. BROWN: Whose examination is this?

Mr. DICKSON: Mr. Whitney's.

Mr. BROWN: Who is examining?

Mr. DICKSON: The cross-examination.

Q. Then, as you understood it, the difference between the $23,587.50 and the $27,000 was made up of these expenses in Europe and Detroit and the $2,000 that was divided between you?

A. Yes, sir. When I gave that testimony that is the way I understood it.

Q. That is what you thought Lawrence said to you?

A. That is what I thought was the fact.

Q. Well, you were undertaking to state what Lawrence told you, weren't you?

A. I don't know whether that was what Lawrence told me or not.

285 Mr. BROWN: No; that inquiry is not what Lawrence told him, but what his understanding was.

Mr. DICKSON: Let's read and see if you were not stating what Lawrence told you: "Upon his return from Detroit about that time he related to us the kind of trade he had made with Captain Ward, stating that he didn't know whether it was a good trade or a bad one, stating that he had delivered to Captain Ward two thousand shares of the stock that he had been carrying around and with it a good many shares of mine and many of Mr. Wood's and a good many of his own, this pool stock that he had yet since we first delivered it to him in 1871, and stating what he had received. He had received $30,000 in Captain Ward's promissory notes, drawing

8 per cent. per annum, payable in one year. Those he had got discounted at Captain Ward's bank, receiving therefor $27,000, I believe it was; that he had also received from Captain Ward a piece of real estate in the city of Detroit, called the Mansion house, and three lots, two adjoining lots and the one the Mansion house stood on, describing what kind of property that was. He had also received shares of the Wyandotte Rolling Mill Company of Wyandotte, Michigan. He had also received shares of the Silver Eyelet Mining Company of Lake Superior, and he had also received a farm of 160 acres in Oakland county, Michigan, stating that of the $27,000 realized from the notes that he had received from Captain Ward and had discounted at his bank he had paid $23,587.50 of that into the banking-house of Wells, Fargo & Co., to the credit of the Eureka Mining Company, to settle some overdrafts that
286 the company made; that he had also settled with himself for his European expenses on his trip to Europe, some little expenses going to Detroit, and had $2,000 left, and he says, 'Now, boys'"——

Mr. BROWN: Now, what is that you have been reading—the New York deposition?

Mr. DICKSON: The New York deposition.

Mr. BROWN: And you examined him a little while ago——

Mr. DICKSON: Cross, on the same subject.

Mr. BROWN: Here?

Mr. DICKSON: No; I haven't come to the Salt Lake deposition.

Q. Now, after you had read Wood's deposition you state that you were examined in Salt Lake further.

A. I believe that Mr. Wood's deposition was taken before I was examined here.

Q. Didn't you in Salt Lake testify as follows: "When Mr. Lawrence reported to you the terms upon which he had made the arrangement or trade with Ward, how much cash did he report that he had received from Ward? A. $27,000. Q. $27,000. What did he say he had done with it or proposed to do with the cash? A. Said he had applied ten thousand of it to take up a note at the Bank of Ypsilanti, Michigan, signed by him, that was then due at that time; there was fifteen thousand in notes to come due, and that would leave about two thousand that he had in his possession to be divided between himself and me and Mr. Wood under the agreement which we had entered between each other, whereby we had decided that the interest that we should enjoy in the trade proceeds realized from the trade with Mr. E. B. Ward, and on November the 9th, I think, he paid me $250, which was my portion of the
287 $2,000—November the 9th, 1872." Didn't you testify to that?

A. Yes, sir.

Q. Which of those two versions of the conversation you had with Lawrence is the true one?

A. The last one is correct—is as near correct as I remember the transaction.

Q. By the way, after the evening of the 18th of October, when

you had the conversation that you have already related, where did you go?

Mr. BROWN: Do you mean that night?

Mr. DICKSON: That night or the next morning.

A. 18th of November?

Q. No; October. Lawrence got back the 18th of October, you say.

A. Yes; 18th of October.

Q. And you had some conversation with him such as you testified to?

A. You ask me where I went.

Q. Where did you go the next morning?

A. I think Mr. Lawrence and myself went to the mines.

Q. The next morning?

A. Yes, sir.

Q. How long did you remain at the mine?

A. I staid there—as near as my memory serves me, I was there two or three days, and I went back to the city; then I went right back again.

Q. You staid there, I think I understood you in your direct examination, until the 3rd of November?

A. I returned from the mine on the evening of the 3rd—evening of the 3rd of November I returned from the mine.

Q. Were you at the mine from the time you and Lawrence went down on the morning of the 19th of October until you returned on the 3rd of November?

A. I couldn't say, sir.

288 Q. Do you remember of being back in the city in the meantime?

A. I do not.

Q. How long did Lawrence remain at the mine when he went down with you on the 19th?

A. Probably not more than a day; he might have come back the next day.

Q. So that you have no recollection of having seen Lawrence from about the 19th of October until the 3rd of November, when you came back here to attend the meeting of the board?

A. We made some settlement, Mr. Wood and I, with Mr. Lawrence in regard to the distribution of the Detroit property and the assuming of one-eighth of this loan that he had made to the company between the 19th day of October and the 3rd of November.

Q. Did Wood go down to the mine with you?

A. No, sir.

Q. You went down——

A. (Interrupting.) Let me explain myself a little. We had that conversation and the agreement we entered into with Mr. Lawrence was between the time Mr. Lawrence and I went to the mine on October 19th and the holding of that meeting. Whether it was in the morning of November 4th or whether I came here between those dates and returned again I am unable to say.

Q. You have no recollection now of having returned from the

mine after you went down there on the 19th of October until you came back on the 3rd of November, have you?

A. I don't now recall anything to refresh my memory whether I returned between those dates or not.

Q. And you have no recollection of meeting Lawrence after the 19th of October and prior to the 3rd or 4th of November?

A. I don't recall anything now that is positive in my mind that I was here.

289 Q. When and where, after the evening of the 18th of October, did you next have a conversation, you and Wood, with Lawrence about this trade?

A. It was in the office of the Eureka Mining Company of Utah.

Q. When?

A. All the conversation that we had.

Q. When was it?

A. I said that I couldn't tell whether it was on the morning of November 4th before that meeting or not.

Q. At all events, you didn't make a trade with him on the evening of the 18th, when he first told you what he had done?

A. I don't think we did; it might have been that evening.

Q. Now, if you afterwards made a trade with him, or settlement—you and Wood—did you make any memorandum of it yourself in your diary?

A. I couldn't say without looking.

Q. Look and see. (Witness refers to book.) If you find any, just let us see; I may object to you reading it, and may not.

A. I find here——

Q. (Interrupting.) Don't read it until I see it; let's see what you find. (Book shown to counsel.)

Mr. BROWN: Let me see what that is.

WITNESS: "Lawrence left Homansville" ——

Q. What I ask you is if you made any memorandum in your diary of the settlement which you finally had with Lawrence about this Ward trade; do you find anything?

A. I was in Salt Lake from the time Mr. Lawrence returned until the 27th day of October, 1872, when I departed and went to the mines.

Q. You were not down to the mine as you thought you were?

290 A. No, sir; I didn't go with Mr. Lawrence. I didn't go to Eureka until the 27th day of October, and returned on the evening of the 3rd of November.

Q. The question, however, that your attention is invited to is whether you made any entry in your diary of the settlement you had with Lawrence.

A. Here is a memorandum of the 4th. (Shows book to counsel.)

Q. Bear in mind all the time that what I invite your attention to is whether you made any entry in that diary of the settlement with Lawrence of the Ward trade.

A. No, sir; I don't discover anything.

Q. That was an important matter, wasn't it?

A. It would be considered so.

Q. Why didn't you—can you give any reason why you didn't make an entry of that in your diary—any explanation of that?

A. No, sir.

Q. You did make an entry in your diary of the salary matter, didn't you; the trustees voting you a salary of $5,500?

A. Yes, sir.

Q. You have that entered in your diary?

A. Yes, sir.

Q. Under that date?

A. Yes, sir.

Q. Now, Mr. Whitney, when do you think, after the 18th of October, you next talked with Lawrence about the Ward trade?

A. I think we had—that conversation about the trade was after he returned from Homansville, when we altogether——

Q. (Interrupting.) What was the next conversation you had with him, irrespective now of the date?

291 A. I don't remember, except the settlement of the interests that we agreed to take.

Q. Can't you tell us what you said in the next conversation you had about it—you and he and Wood?

A. Whenever that time was that we made that settlement, he related what kind of a trade it was, and said, "Gentlemen" ——

Q. (Interrupting.) Did he relate again what kind of a trade it was when you had that settlement?

A. I think he must.

Q. He already had related it to you?

A. Yes, sir.

Q. And then started in and related it again?

A. He says that——

Q. (Interrupting.) Go on and state what he said.

A. He said that "I have made this kind of a trade and you can have"——

Q. (Interrupting.) You say he related what kind of a trade; go on and state what he related on the second occasion.

A. Well, we knew what kind of a trade what he said he had made before.

Q. You said he related it.

A. And he said, "Now"——

Q. (Interrupting.) Did he——

Mr. JUDD: Let the witness answer; you keep cutting it up.

Q. Did he relate it again? I want to know whether you are mistaken about that?

Mr. JUDD: The witness started on to tell you what did occur.

Mr. DICKSON: He says he "related." I don't want him to say he related.

Q. Did he relate again the trade he made?

A. I won't be positive; we understood what he said the trade was.

Q. Then go on and tell us as nearly as you can what he said in the second conversation.

A. He says, "You can have as much of this trade as you
292 desire, or you need not have any of it, or you can have it all if you want it," and I made a remark myself, that inasmuch as he had delivered 250 shares of my stock to Captain Ward out of the two thousand shares, that being one-eighth, that if it was a very poor trade, as he had some idea that it might prove to be, we ought to take that interest, and if it was ever so good a trade we ought not to ask for any more than that proportion; and as for trying to take it all ourselves, that wouldn't be what the understanding was, and that I was satisfied to take any proportion as the shares he had turned over of mine, which was one-eighth, and then he spoke about this mortgage. He had loaned $23,587.50 to the company, and he says, "I will desire that you take an interest in that, as the money has gone into a mortgage, and I don't know when it will ever come back again." I says, "All right; I am willing to assume one-eighth of that if that pleases you," and we did so, and there was very little more said about it; it was all settled at that conversation, what we would do.

Q. What did Wood say?

A. Mr. Wood said that he would take the same.

Q. That is the whole that you remember, is it?

A. That is the substance of it and as I remember it.

Q. Did Lawrence tell you how many shares of your stock he delivered?

A. Yes, sir; he said he had delivered a certificate of 250 shares in my name and the same kind of a certificate in Mr. Wood's name.

Q. Did you testify to that in New York?

A. I can't say.

Q. Didn't you say in New York that this is what he said to
293 you, "Stating that he had delivered to Captain Ward two thousand shares of mine and many of Mr. Wood's and a good many of his own"?

A. I might have said that.

Q. Was it true?

A. Yes, sir; if I stated that; that is similar to what I have just stated.

Q. Is it?

A. That he delivered 250 shares of my stock and 250 shares of Wood's stock.

Q. "Two thousand shares of the stock that he had been carrying around, and with it a good many shares of mine and many of Mr. Wood's and a good many of his own."

A. I may have stated it in that way.

Q. Well, was that what he said, or did he say he delivered one certificate of yours for 250 shares and one of Wood's for——

A. (Interrupting.) I think he said he delivered a certificate of 250 shares.

Q. That is what Mr. Wood testified, isn't it, in his deposition?

He said just as you say now, that Lawrence said he delivered a certificate of yours of 250 and a certificate of Wood's of 250, didn't he?

A. Yes, sir.

Q. Is that why you changed your testimony?

A. I don't know that it is.

Q. Did you ever have any other trade with Mr. Ward yourself?

A. No, sir; I never seen Mr. Ward, not until after that time.

Q. You never sold any stock to him directly?

A. No, sir.

Q. Never transferred any to him?

A. No, sir; not that I know of.

Q. Except such——

A. (Interrupting.) Except one certificate.

Q. Except what Lawrence had delivered over of yours?

294 A. Yes; that is all.

Q. And you arrived at the conclusion that you were entitled to a one-eighth interest in the Ward trade because Lawrence stated to you that of the 2,000 shares delivered by him to Ward 250 belonged to you?

A. That was the agreement between Mr. Wood and Mr. Lawrence and myself, and we arrived at it between ourselves.

Q. You hit upon an eighth because he had informed you that he had given 250 of your shares?

A. That was agreed at the time we had this conversation together.

Q. Your intention was to take in that trade an amount which would equal in proportion the number of shares of your stock that had been delivered of the 2,000?

A. Yes, sir.

Q. As 250 would be to 2,000 so would your interest be in the receipts of that trade?

A. Yes, sir.

Q. And if he had delivered 400 shares, for instance, of your stock, you would have thought that you were entitled to a fifth?

A. Yes, sir.

Q. And would have insisted on it?

A. Yes, sir.

Q. Didn't he deliver 450 of your shares?

A. I don't know; I don't think he did.

Q. Look at Mr. Ward's account under date of November 2nd, 1872, and you see how many shares were transferred to him from you. See if it is not 450.

A. That book shows so, but I don't think you will find that I ever had certificate number 114.

Q. Just read that off, what that stock ledger of the company shows was transferred from you to Ward on the 2nd day of November, 1872.

A. "John N. Whitney." This is the ledger under Mr.

295 Ward's ledger account. "John N. Whitney, certificate; No. of shares transferred, 35; No. shares received, 112." That ought to be the number of the certificate.

Mr. BROWN: That is the number of the certificate. You are not reading that correctly.

A. Certificate No. 35 was cut up and the certificate issued, No. 112, for 100 shares in the name of Captain Ward, the same certificate being surrendered; No. 25, another certificate; No. 113 was transferred of 150 shares, making 250. Certificate No. 61 was surrendered and certificate 114 issued to Captain Ward for 200 shares.

Q. That makes 450 altogether, does it?

A. This book shows that I transferred 450 shares, but certificate No. 61 I don't think was in my name.

Q. That was under date of November 2nd, 1872, wasn't it?

A. Yes, sir; that is an error of the book-keeper.

Mr. BROWN: Right here, while it is fresh, I ask leave to introduce and show the stub of certificate 61.

The COURT: Wouldn't it be better upon re-examination?

Mr. BROWN: Perhaps so. I think it would be fairer to show it in this connection. I don't care, if there is any objection.

The COURT: For the purpose of enabling the witness to make any correction or complete his answer I think it is perfectly proper for him to look at that book.

Mr. BROWN: I will ask him afterward.

Q. When next did you have any conversation with Mr. Lawrence after you had arrived at this adjustment of your respective
296 interests in the Ward trade?

A. We was there several days, and came in the office.

Q. If you cannot remember when next you conversed with him, what was the next conversation that you had with him relating to any matter which is involved in this suit?

A. I cannot relate any.

Q. Did you ever have any further conversation with him about the matters involved in this action?

A. We had a great many conversations together.

Q. I mean along about that time. Did you have any other conversation with him that fall about anything that is involved in this action that you brought here?

A. I can't state whether I did or not; I had many conversations with him.

Q. Didn't you have a conversation with him about your salary—didn't you testify?

A. That was on the morning of the 4th of November.

Q. Well, you haven't told me about that; what was that conversation?

A. He says to me and Mr. Wood, he says, "About how much do you think you ought to have?" Well, I told him that he had been at the head of the company all the time and had done a good deal of managing, and in fact he was the manager of the finances of the company and drew the checks and was in the office all the time with Mr. Wood; Mr. Wood had done very little and I had done very little in comparison to what he had, and I thought he ought to have more than what Mr. Wood—more salary—and he made the

figures out, putting himself down nine thousand and Mr. Wood fifty-five hundred and me fifty-five hundred, and showed it
297 to us, and I said, "I am satisfied with that division of the salary," and he made out the vouchers himself, as near as I now remember.

Q. When was that, do you think?

A. I think that was the morning of the 3rd of November, 1872.

Q. Prior to the meeting of the trustees of the same day?

A. Yes.

Q. And at a meeting of the trustees those vouchers were presented?

A. Yes, sir; with other vouchers.

Q. And allowed?

A. Yes, sir.

Q. You made a mistake and said it was on the 21st of August before; in what conversation was it that Lawrence said to you, "Now, I will tell you why I telegraphed you to pass that check"?

A. That was on the evening of his return from Detroit.

Q. 18th of October?

A. Yes, sir.

Q. What did he say about that?

A. He says that "Mr. Ward asked me if there was any indebtedness on the mine, the day that we was talking trade, and I told him that there was, but how much I was unable to state, but I would guarantee to Mr. Ward that it should not exceed fifty thousand dollars, and I then at once telegraphed you to pass a check, so that we could date it back so as to have the indebtedness come in prior to the trade made by Mr. Ward."

Q. That is, have the indebtedness liquidated—cancelled—prior to the trade?

A. Have the indebtedness on the mine—the maximum indebtedness—before he made his trade or guaranty.

298 Q. Then, if I understand you, it was this that he had telegraphed you: To pass that check in the check book because he had represented or guaranteed to Mr. Ward that the indebtedness should not exceed $50,000, and he wanted this check to meet overdrafts—wanted to date it back to meet overdrafts, so that that guaranty would be kept good?

A. Nothing said about overdrafts; not about this transaction. He repeated to me during the whole summer that the bank account was overdrawn.

Q. Do you remember that——

A. (Interrupting.) I think he stated it was overdrawn even after he had returned from Europe.

Q. You remember what—what Mr. Wood said about that?

A. No, sir.

Q. In his deposition; you don't remember?

A. No, sir.

Q. What you remember about it is, he says, "Now, I will tell you why I wanted you to pass that check. I guaranteed Ward that the indebtedness did not exceed fifty thousand dollars."

A. Yes, sir.

Q. "And I wanted this blank check so that I could date it back and keep that guaranty good."

A. He wanted to have it dated back so that the transaction and the record would show that there was an indebtedness of $43,587.50 on the property at the time he was making the trade, as I understood it.

Q. He wanted to date it back so that the books would show that there wasn't an indebtedness to exceed fifty thousand at the time he made this representation to Ward?

A. Yes, sir; I so understood it.

Q. Didn't you testify yesterday that he said to you, "Now, I will tell you why I telegraphed you to pass that check; that was
299 so that we could pay ourselves the salary"?

A. I may have stated that so yesterday.

Q. If you did say that, was it true?

A. I didn't understand that I was going to—let me see; the first time he mentioned that check, on his return from Detroit, I didn't understand then that he was going to assume and put that into the mortgage.

Q. I am not talking about the mortgage at all now. You testified yesterday in substance, did you not, that Lawrence said, in explanation of why he telegraphed you to pass the check, that it was so you could pay yourselves your salaries?

A. I may have said that yesterday.

Q. Was it true?

A. Well, I don't know whether I so understood that or not.

Q. Why did you testify to it, then, yesterday?

A. I am unable to say.

Thereupon the court took a recess until 2 o'clock p. m.

SATURDAY AFTERNOON, *June 28th*, 1890.

JOHN N. WHITNEY being recalled, the cross-examination was resumed by Mr. DICKSON as follows:

Q. On the 4th of November, you say it was, you had a talk with Lawrence and Wood about your salaries?

A. Yes, sir.

Q. On the morning of that day — a board meeting of the board of trustees?

A. Yes, sir.

Q. And subsequently at a meeting of the trustees held on that day those vouchers were presented and allowed you?

A. Yes, sir.

Q. Up to that time had you any other conversation with
300 Lawrence about the salaries except to agree upon the morning and have it understood that it should be brought to the attention of the board of trustees for their approval?

A. I can't say now.

Q. You can't remember?

A. I cannot now say whether I had conversation or not.

Q. When did you next have any conversation with Lawrence about those salaries after the meeting of the board of trustees at which they were allowed?

A. I am unable to state.

Q. Well, about when?

A. I can't say.

Q. Well, give us your best judgment as to how long after the 4th of November.

A. I am unable to locate any particular day, it being so far back.

Q. Well, come as near to it as you can.

A. I am not going to undertake to come near it.

Q. Not going to undertake it at all?

A. No, sir.

Q. What was the next conversation you had with him, then, irrespective of the date, about those salaries?

A. I am not going to undertake to answer that question, because I don't remember.

Q. Don't remember any other conversation?

A. No, sir.

Q. As I understand you, Mr. Whitney, all you have told us about those salaries, so far, in cross-examination, is that somewhere about the 4th of November Lawrence suggested to you and Wood that you get the board of trustees to allow a salary, and that you suggested that he had done more important service than either one of you and he ought to have more than either you or Wood, and that then he took a piece of paper and made some figures by
301 which he arrived at the conclusion that he would present a bill for nine thousand dollars for his own services and fifty-five hundred each for you and Wood, and that subsequently to that there had been a meeting of the board of trustees and those vouchers were presented and allowed. Now, if there was ever anything else that took place between you and Lawrence and Wood respecting those salaries we want to know it.

A. I would be happy to answer that question if I could remember any date when any conversation took place.

Q. I am not asking the date; you may disregard the date; tell us anything else that was ever said between you and Lawrence and Wood about those salaries.

A. I don't remember anything being said, unless it might be that that salary account was to be inserted in the mortgage.

Q. Well, was that said?

A. I am inclined to think it was.

Q. Are you in doubt about that?

A. No, sir; I don't think I have any doubt about it.

Q. You say you are inclined to think it was. What do you mean by that if you have no doubt about it?

A. That is, — my memory serves me correctly I believe that was said.

Q. What?

A. Something of that nature.

Q. Just state now as nearly as you can what was said.

A. I have stated it before.

Q. Be good enough to state it again.

A. That that salary account that had been voted to us would be inserted in the mortgage.

Q. When was that said and by whom?

302 A. I don't say it was said.

Q. You don't say it was said?

A. It was either said or understood by me from what had been said before.

Q. Tell us everything in substance that you can remember that Lawrence ever said about that.

A. I have said that I wouldn't undertake to state anything that I didn't positively remember.

Q. Haven't you undertaken to testify that Lawrence said that; didn't you swear that he did in New York, and didn't you testify so yesterday?

A. I testified three minutes ago what the conversation was on the 4th of November.

Mr. JUDD: Wait a moment, Mr. Whitney. I desire to interpose an objection here. Mr. Dickson has left that conversation where he testified about that matter and has gone forward and says, "Tell us anything that ever occurred at any time after that," and that is what the witness is testifying about. Now Mr. Dickson seeks to take him back to go over what has been said on that subject, and I object to that, so much repetition of it. If he seeks to have him go back and repeat his testimony I think it but fair to call his attention to that.

Mr. DICKSON: The witness has said in cross-examination—whether he meant to say it or not, I don't know, but the reporter's notes will show that in cross-examination he has said that all the conversation he had with Lawrence about those salaries—that at some time before a meeting of the board of trustees on the 4th of November, and then on the morning of the meeting when he and Lawrence and Wood being together Lawrence suggested that they have the trustees allow them salaries, and that they then conversed

303 about the amount of the salaries, and that the witness stated that Mr. Lawrence ought to have more than either of the others for reasons that he explained; that Mr. Lawrence thereupon sat down and figured some on a piece of paper and made his salary nine thousand and each of the others fifty-five hundred, and he said he, the witness, was content with that; that Mr. Lawrence prepared the vouchers and when the board of trustees met that day the vouchers were presented and allowed. Now, I ask you, in addition to that, if Lawrence ever said to you or in your presence anything about those salaries at any time; I don't care when it was.

Mr. JUDD: Do you mean after that you have just repeated or before?

Mr. DICKSON: I don't care when—before or after, at any time. What was it?

The COURT: I think that in this kind of an examination, Judge Judd, the other party being dead, if this witness'es testimony is to be received the cross-examination ought to be about as liberal as it would be in any case, because it is the only version of the transaction being given in evidence; therefore the party testifying to a transaction of that kind ought to submit to a very thorough cross-examination. Of course, it ought to be a fair one. Now, I understand that question to be that he has testified to a conversation at a prior time. The question is whether at any other time, before or after, there was another conversation concerning it. It seems to me that is all right.

Mr. JUDD: My objection was that he had already gone over that before and left it and gone forward of it, and I cannot see that he has the right to repeat the testimony so often.

304 The COURT: That is unavoidable sometimes. Of course it should be avoided so far as possible, but of course when any question is put by counsel on the opposite side that it is supposed the witness does not fully understand or that he answered it not fully comprehending what it referred to, or something like that, that question ought to be straightened out on the argument or at the time if his attention is called to it.

Mr. DICKSON:

Q. Now, tell us anything which you remember that Captain Lawrence said to you or in your presence at any time about those salaries, if you remember anything.

A. Not having anything before me to refresh my memory what was said or occurred, I can't answer that question any further than I have already answered, that what occurred during that time, on the 4th of November or a few days previous thereto.

Q. Did he in any of these conversations say anything about the salaries going into the mortgage?

A. Yes, sir; that was what he said on the 4th of November; that was the understanding that we all had.

Q. What did he say?

A. That that money ought to go into that mortgage.

Q. What was it he said on the 4th of November about that?

A. You have repeated my saying to the court here; shall I repeat that again?

Q. What was it he said on the 4th about those salaries?

The COURT: Answer the question.

A. He said, "We will get the trustees to vote our salaries
305 which was decided upon and place it in the mortgage, which will make it, then, $43,587.50, with the money already advanced to the Eureka Mining Company of Utah before."

Q. Now, Mr. Whitney, didn't you say this morning, just before court adjourned, that on the 4th, at that conversation, there was nothing said about those salaries going into the mortgage?

A. I don't think I did.

Q. Well, when he made this statement on the 4th, what did he say?

A. I acquiesced in it and let my interest go into the mortgage.

Q. What did you say, if you remember?

A. I said, if I remember rightly, "If that is your way of running the thing I am satisfied."

Q. Now, have you any recollection of saying anything of that kind as you stand here today?

A. I think I have a distinct recollection of that.

Q. What did Wood say?

A. I don't remember what he did say.

Q. Do you remember the substance of what he said?

A. I don't remember anything that he said at all, to undertake to repeat anything.

Q. Was he there?

A. He was there; yes, sir.

Q. I call your attention to page 45 of the Minute Book, purporting to contain minutes of the meeting of the board of trustees held on November 9th, 1872, and read to you a portion: "Whereas this corporation was, on August 22nd, 1872, indebted to Joab Lawrence for moneys advanced up to that date in the sum of $23,587.50, and on November 7th, A. D. 1872, in the further sum of $20,000
306 by him at that date loaned and advanced to this company, which sum aggregating the sum of $43,587.50, justly due and owing him, the said Lawrence! Now, for the purpose, and so on." You were present when that record was made?

A. I was.

Q. Did it contain the truth, as you understood it, that this $20,000 was for money loaned and advanced by Lawrence to the company?

A. No, sir.

Q. It wasn't true?

A. No, sir.

Q. Why didn't you object to the record being made? Why didn't you object to the false record being made?

A. That matter was left entirely to him to act and do and conduct the business of the Eureka Mining Company in his own way.

Q. Every one of the parties——

A. Mr. Wood and I did not have a thing to say how that thing should be managed or how the company should be run. It was entirely left with Mr. Lawrence. That was one of his masterly acts.

Q. You were one of the board of directors of that meeting?

A. Yes, sir; exactly. So was Wood.

Q. And every one of these directors knew that these salaries had been voted a few days before to you three gentlemen?

A. I think so.

Q. Then why did you silently consent to a false record being made if these men all knew it?

A. Well, I think that we were led, perhaps, through Mr. Lawrence's influence.

Q. You think what?

A. I think I was; I think Mr. Wood might have been.

Q. What did Mr. Lawrence say that led you to acquiesce
307 in the making of a false record?

A. Wood, since the organization of the company—Wood simply left the whole matter with him and simply acted as trustee under his direction.

Q. That is the only explanation you offer?

A. Yes, sir.

Q. (Showing paper to witness.) Look at that paper I hand you and state whether that is in your handwriting and sent by you.

A. That is written by me; yes, sir.

(Said paper was marked Exhibit 7 for identification.)

Q. That is a letter from you to Mr. Lawrence?

A. Yes, sir.

Q. I want to read a very few words in the letter. Speaking of Mr. Whitney, of the firm of Bennett & Whitney, in this letter you say that he, Whitney, said that he could beat the mortgage, etc. (Reads:) "I told — he couldn't beat one side of the mortgage; that you had advanced that amount and could recover it in equity." Did you state that to Mr. Whitney?

A. I think I did.

Q. Was it true?

A. That was my opinion, that that mortgage would hold the property.

Q. "I told him he couldn't beat one side of it; that you had advanced that amount." Was that true?

A. That I had advanced?

Q. No; meaning Mr. Lawrence. "I told" (that is, you—told Whitney, of the firm of Bennett & Whitney), "that he could not beat one side of the mortgage, because Lawrence had advanced that amount of money." Was that true?

A. It was true that he advanced $23,587.50 at one time and the $20,000 at another.

Q. He had advanced it?

A. I understood so.

308 Q. That Lawrence had advanced to the company $43,-587.50?

A. The salary account it wasn't paid to us, but it was in some mode.

Q. Didn't you when you made that statement to Whitney mean to convey to him the idea that Lawrence had advanced that amount of money in cash?

A. He had advanced $23,587.50, and the salaries which were voted to us, never paid to us, was also added to the mortgage.

Q. When you said to Whitney that he couldn't beat one side of that mortgage because Lawrence had advanced that amount of money, didn't you mean him to understand thereby that Lawrence had advanced the amount called for in the mortgage, in cash?

A. He had advanced it for himself and for me and Mr. Wood.

Q. I know that is what you say, but didn't you mean that Mr. Whitney should understand that Lawrence had advanced that amount of money in cash?

A. I wasn't explaining to Mr. Whitney then how he had advanced it; he had advanced it for me and Mr. Wood; our salary account was put it.

Q. Will you not answer that question as to whether or no you meant Mr. Whitney to understand by that statement of yours that Lawrence had advanced the money, in coin, as a loan to the company?

A. I might have wanted Mr. Whitney to believe that Mr. Lawrence had advanced the whole of it.

Q. Did you in making that statement want him to think that?

A. I would want him to think so.

Q. That you were not telling the truth?

A. No, sir.

Q. After the 4th, Lawrence said you should put into
309 the mortgage, and you and Wood acquiesced in it. What next occurred between you and Lawrence respecting the salaries?

A. I can't recollect anything that occurred specially.

Q. Nothing at all?

A. No, sir; other than I have stated.

Q. When was the check drawn?

A. The check was drawn on the 7th of November.

Q. How do you remember that date?

A. I don't know how I do remember it.

Q. Can't you give any reason? The check bearsdate on October 3rd, doesn't it?

A. Yes, sir.

Q. Now, can't you give any reason for testifying that it was drawn on the 7th day of November and not on the 3rd day of October?

A. I don't think of anything now.

Q. Did you ever think of anything that enabled you to fix that date?

A. I have been able to definitely locate the date.

Q. In what way?

A. By the books of the company as well as by those statements of the Eureka Mining Company's account at that time.

Q. Is there anything in any book of the company that tends to show that check was drawn on the 7th day of November?

A. I have never seen anything that I remember of.

Q. There is not any record or any memorandum in writing of any kind in any place from which you got the information that that check was drawn on the 7th day of November?

A. I have seen it in the statement of the Eureka Mining Company of Utah; account done through Wells, Fargo & Co. books, I think, was where I saw it.

Q. That that check was drawn on the 7th of November?
310 A. The transaction at the bank was made that day.

Q. What transaction?
A. The turning of that check over to the bank.
Q. The check 287?
A. Yes, sir.
Q. How do you know that was the check of the salary account?
A. By being told by Mr. Lawrence that it was for that purpose.
Q. Did you see the check at that time?
A. I didn't take the check into my hand to examine it.
Q. You didn't know for what amount it was, did you?
A. No, sir.
Q. Never had it in your hands?
A. No, sir.
Q. Lawrence simply held up a check, as I understand you, and said, "That is the check for our salaries"?
A. Yes, sir.
Q. How did you know that check was drawn on the 7th of November?
A. By being handed to the bank, and the records of the bank shows it on that day.
Q. The account of the bank shows that check 287 was presented at the bank that day?
A. Yes, sir.
Q. And therefore you argue from that that it was drawn on that day. Is that it?
A. Yes, sir; I think that statement of the bank was handed me in July, 1888.
Q. Now, that check appears by the endorsement to have been paid when presented, doesn't it?
A. I don't know.
Q. Doesn't the stamp show that?
A. The stamp says Wells, Fargo & Co.
Q. This check for $31,280, bearing date October 3rd, 1872, appears to have been paid when presented, doesn't it?
311 A. Yes, sir.
Q. Do you know what became of the money?
A. No, sir.
Q. Did you ever have any conversation afterwards with Mr. Lawrence about that check?
A. No, sir.
Q. Or about the salary?
A. I never saw the check until 1883.

Mr. DICKSON: I will have the check marked for identification.
(Said check was marked Exhibit 8 for identification.)
Mr. BROWN: I will offer it in evidence now, the stub and the check.
The COURT: It will be admitted.
(Said check was thereupon marked Exhibit A. K.)

Q. When, if at all, after the 7th of November did you have any other conversation with Mr. Lawrence about that salary account?
A. I disremember.

Q. Did you ever have?
A. I couldn't say, sir.
Q. Have you any recollection of ever having spoken with him about it after the 7th of November or 4th of November?
A. I don't remember that I did—that is, I don't remember—it is so long ago—whether there was any conversation occurred or not about the salary.
Q. After the 4th of November?
A. Yes.
Q. What happened on the day you specify that Mr. Lawrence made out these two papers on the 9th of November, 1872, and handed them to you about 5 o'clock, I think you said?
A. That is the time he delivered them, between 5 and 6 o'clock.
Q. You remember that, too?
A. Yes, sir.
Q. That it was between 5 and 6 o'clock on the 9th of No-
312 vember that this paper was delivered to you?
A. That is as near as I remember now; just before I went to dinner.
Q. Did you make any memorandum at the time?
A. I couldn't say that I did.
Q. You never made any memorandum in your diary about this, I understand you?
A. I don't know.
Q. Couldn't you find anything this morning?
A. I didn't look.
Q. Didn't you look to see whether you had in your diary any entry respecting the Ward trade at all?
A. Yes, sir.
Q. Did you find anything?
A. Not at the date I was looking at.
Q. Could you find anything at all under any date?
A. I didn't go along up to the 9th.
Q. Please do so now.

(Witness refers to book.)

A. All the entries I have got here is board of directors' meeting of the Eureka Mining Company held to ratify resolution, by-laws, and loan, is all the memorandum I have got.
Q. Is there anything there respecting the Ward transaction?
A. No, sir.
Q. Nothing in your diary at all?
A. No.
Q. The meeting, I suppose——
A. Not at this date. I will see.
Q. Well, under any date that you can find.
A. I have not discovered anything.
Q. Can you discover anything?
A. Not between those dates.
Q. Under any date.
A. I don't know that I can.

Q. The meeting of the board of trustees held on the 9th
313 was held at what hour in the day, before or after this declaration was handed to you?
A. It was held right after dinner.
Q. Before this declaration was handed to you?
A. Yes, sir.
Q. So that this came into your possession from Lawrence after that board meeting had adjourned?
A. Yes, sir.
Q. How long, if you know, did Lawrence remain in the city after that?
A. I don't know.
Q. Some time, didn't he?
A. I left the next morning, the morning of the 10th, and went to the city of Detroit.
Q. Is that in your diary?
A. Yes, sir.
Q. When did you return?
A. I didn't return that year, 1872.
Q. Wasn't back here at all?
A. No, sir.
Q. That year?
A. No, sir; I returned in time to attend the annual meeting of the stockholders.
Q. In January of the following year?
A. January 14th.
Q. January, 1873?
A. Yes, sir.
Q. Was Lawrence here then?
A. Yes, sir.
Q. He was at the meeting?
A. He was at that meeting.
Q. And others was there?
A. Yes, sir.
Q. The meeting of January, 1873?
A. The 14th.
Q. Where were you in November, 1872—where were you boarding, the Continental?
A. I was boarding at the same house.
Q. With Lawrence?
A. Called the Townsend house.
Q. Lawrence boarded there also at that time?
A. Yes, sir.
Q. Wood boarded there, too?
A. Yes, sir.
Q. So at the time this paper bears date all three of you gentlemen were boarding at the same house?
314 A. I am inclined to think I was boarding there, as near as I can remember. I was at the mine most of the time, but I think I stopped there when I came up.

Q. Now, if I understand you, Mr. Lawrence wrote these two papers the same day?

A. Yes, sir.

Q. At the same desk?

A. Yes, sir.

Q. And at the same time?

A. Yes, sir.

Q. One right after the other?

A. Yes, sir.

Q. And delivered them simultaneously, handing one to you and one to Wood?

A. That is my testimony and that is the fact.

Q. What did he say, if anything, when he handed it to you?

A. He said, "There is your interest in the property I acquired of Mr. Ward and refers to a settlement Wood made, and also to the money loaned to the Eureka Mining Company of Utah."

Q. That is what I said?

A. Yes, sir.

Q. You remember that?

A. That is as near as I now remember it. I can't repeat it word for word, what he did say.

Q. What did he do then?

A. I took the paper and began to read it. I handn't asked him for any such paper as that; I hadn't requested him to give me any such paper at all.

Q. I think you said Mr. Wood had been requesting it?

A. Yes, sir; Mr. Wood had. I wasn't in the office at the time.

Q. What did Lawrence do after handing you those papers and making that remark?

A. He went to the hotel, to dinner.

Q. What did you and Wood do?

A. I got up from the desk I was sitting at and went back to the desk where Mr. Wood was sitting, and we compared our papers.

315 Q. Compared them there and then?

A. Yes, sir.

Q. And I think you then discovered that they were not alike?

A. Yes, sir. I made a pencil memorandum on the face of mine, inserting what was left out of mine.

Q. You made that that very day?

A. Yes, sir; that evening.

Q. Are you sure of that, Mr. Whitney?

A. Yes, sir; all that pencilling was put on there.

Q. You observed at that time that yours called for one-eighth interest in $23,587.50?

A. Yes, sir.

Q. And that Mr. Wood's called for a one-eighth interest in $25,000?

A. Yes, sir.

Q. Did you testify in New York before Wood's declaration had been found that you compared them, and that they were exactly alike?

A. I might have done so.
Q. Didn't you do so?
A. The probabilities is I did.
Q. Well, to save me hunting for it, if you will just say yes or no—did you testify in New York——
A. I think I did.
Q. That you compared them, and that they were exactly alike?
A. I think I so testified.
Q. Why did you testify to that?
A. Because I believed that they were. I have forgotten about how that pencilling——
Q. What is that?
A. I believe they were, but I have forgotten.
Q. Didn't you see the pencilling on your paper?
A. Yes, sir. I say, if you will let me finish my answer, I will explain that right now.
Q. All right.
A. I had forgotten what that pencilling on the face of my declaration was placed there for. I couldn't——
316 Q. You couldn't make it out?
A. Didn't seem to remember how it happened to be put there at the time I was in New York.
Q. Now, do you remember?
A. When I come to compare that with Mr. Wood's, it was fresh in my memory then how it came—how it all occurred.
Q. You discovered this discrepancy between the two then, a very few minutes after they were handed to you?
A. As soon as I saw Mr. Wood's declaration.
Q. That was just a few minutes after they were handed to you you compared them?
A. In the office, yes, sir; and I put that pencilling on at that time.
Q. Why didn't you then, that evening, when you went to the hotel, have Lawrence correct it?
A. I couldn't say why.
Q. Why didn't you call his attention when you went to the hotel that evening, that a mistake had been made?
A. I can't answer that question, why.
Q. When you got back here in January, 1873, and met Lawrence at the board meeting, why didn't you then call his attention to the fact that he had made a mistake in your declaration?
A. Probably I didn't think about it at that time; wasn't thinking of the matter when I came back here in January.
Q. You knew, did you not, when this paper was handed to you that it didn't speak the truth?
A. I knew it was for $23,587.50 and Mr. Wood's was for the other sum.
Q. You knew that this didn't speak the truth, didn't you?
A. I knew that it didn't include the salary account.
Q. You knew that it didn't include when it said that you were

"entitled to one-eighth of $23,587.50, which the Eureka
317 Mining Company was indebted to me," that that wasn't the whole truth, didn't you?

A. I think that my declaration is the fact and that Mr. Wood's is not the fact.

Q. I am speaking now with reference to the salary.

A. Oh, the salary. It was not the intention of having it inserted in there at all.

Q. It was talked over between you?

A. I believe it was.

Q. I mean between you and Lawrence?

A. I believe between us all.

Q. It was talked over between you that that should not appear in the declaration?

A. I think it was; I so understood it.

Q. What was said about that?

A. It was understood that it should not be inserted in that.

Q. Tell us anything that was said, if you can.

A. The mortgage wasn't executed at that time.

Q. Tell us anything that was said about that salary not appearing in this declaration.

A. There was nothing said when that declaration was handed to me about that, salaries not being put in there.

Q. Didn't you just state as a reason why it was not in there was that it was understood that it should not go in there?

A. The salary account had been voted that day to——

Q. No; the salary account had been voted five days before.

A. Yes; on the 4th, but the mortgage hadn't been executed.

Q. I understand that. Didn't you testify in New York that the mortgage was executed before this paper was delivered?

A. I may have done so; I don't know whether I did or not now.

318 Q. This paper, you know, doesn't say anything about a mortgage; it simply speaks of your interest in the debt which is due to Lawrence from the Eureka Mining Company?

A. Yes, sir.

Q. Now, why didn't you have included in that the fifty-five hundred dollars?

A. Didn't insist upon it—didn't insist that it was best to have it there.

Q. Why, what was said about it not being best to have it there?

A. There was some talk to me.

Q. By whom?

A. Between me and Lawrence there at that time, or some time subsequent, about the mortgage having been placed and the sum of the salaries having been placed in the mortgage. There was some doubt in our minds about the validity of that.

Q. Didn't you just say you and Lawrence thought the salary account was all right and the mortgage would take that property?

A. That is what I said. I told Mr. Whitney.

Q. Didn't you say you always thought so before yourself?

A. I don't believe I said that.

Q. Didn't you say that in your conversation with Lawrence in December, 1885, when you talked about a compromise?

A. Yes; I might have said I thought the mortgage would take everything. I didn't believe in any compromise at all.

Q. Didn't you think the mortgage was all right?

A. I thought the mortgage would stand a test.

Q. Then can you give to the court any explanation as to why you didn't have this declaration corrected at the time it was given to you, so as to show just what your interest in that indebtedness was?

A. I think that shows my interest so far as the money
319 advanced to the company and the mortgage. The salary account—we didn't get that in there.

Q. Hadn't the company five days prior to this voted to pay you and Lawrence and Wood twenty thousand dollars?

A. Yes, sir.

Q. And that was unpaid at the time?

A. Yes, sir.

Q. It was debt due from the company at that time, as you understood it, didn't you?

A. Yes, sir; was voted.

Q. Then, when Lawrence gave you a paper saying you were interested one-eighth in the $23,587.50 which the Eureka Mining Company was indebted to him, why didn't you have him correct that, so as to include the $5,500?

Mr. JUDD: That is the fourth time that question has been put, and he has given an answer to it three times.

Mr. DICKSON: If he has I have not heard it.

Q. I understand you, Mr. Whitney, to say that on the 4th of November the company voted you and Lawrence and Wood the salaries amounting in all to twenty thousand dollars.

A. Yes; I said so.

Q. And that on the 9th of November, when this paper was handed to you, no part of it was paid?

A. No, sir.

Q. And you then regarded it as a debt due from the company to you people?

A. Yes, sir.

Q. Then why was it that when Lawrence handed you a paper stating that you were interested in one-eighth of $23,587.50, which the Eureka Company owed him, why didn't you have him correct it so as to include the $5,500?

A. I didn't desire to have it corrected.

320 Q. Well, now, why?

A. I didn't think I wanted it on paper at all.

Q. Didn't think you wanted it to appear on paper?

A. No, sir.

Q. Didn't you testify in New York that you did want it on paper, and that you afterwards tried to get it in writing?

A. I don't think I did.

Q. (Showing witness a paper.) Look at this and state if they are in your handwriting.

A. Yes, sir.

Q. (Showing paper to witness.) And this also?

A. Yes, sir.

Q. These were papers that were introduced in New York when you gave your deposition there, presented to you on cross-examination?

A. Yes, sir.

Q. As the papers that you subsequently forwarded to Mr. Lawrence to obtain his signature to?

A. Yes, sir.

Q. And failed to obtain his signature to?

A. Yes, sir.

(Papers last shown witness were marked exhibits, respectively Exhibits 9 and 10, for identification.)

Q. I will have to read you at some length, and ask you if you didn't testify so in New York:

"Q. Didn't you yourself prepare any other paper? A. Not at that time. Q. Did you at any time? A. I did at one time. Q. And mailed it to him when he was in St. Louis or Chicago? A. Yes. Q. When was that? A. A year or two afterwards. I wanted a different style of description, and I never heard from him—never got an answer from him, and never paid any further attention
321 to it. Q. What different style of description did you want? A. I think that made mention of a $43,000 mortgage coming off this loan to the company. I wanted it mentioned more in the mortgage, that is all; I wanted to express the mortgage. Q. That is, you wanted him to certify you were entitled to one-eighth interest in the mortgage? A. Oh, more than that. I wanted to consolidate our loans that we had made in the shape of our salary for fifty-five hundred each. I had fifty-five hundred in salary added to one-eighth interest in that former loan; I wanted that acknowledged by him. Q. You are certain that on the 4th of November you had the conversation about loaning the company the twenty thousand dollars and adding it to the mortgage? A. Yes, sir. Q. Was that the statement that was made to you, that it would be added to that and made a part of the same? When he wrote the papers, which he did on the 9th, did you read it? A. Yes, sir. Q. But you made no objection to it? A. No, sir. Q. You say, then, that it didn't include the twenty thousand dollars? A. Yes; I say that at that time. Q. The mortgage had then been made out, had it not? A. No, sir. Q. When was the mortgage made? A. Yes—it had been made between the 4th and the 9th. Q. You were present at the meeting of the board of directors when it was approved? A. Yes; before that meeting that statement was handed to us. Q.
322 You mean after the meeting of November 4th? A. Yes; on the 9th. Q. What did you say when you looked over this paper? A. I didn't say nothing; I thought that was the acknowledgment of what interest we had there outside of the fifty-five hun-

dred dollars; it wasn't mentioned in that which culminated in a mortgage, and I not having received any of it since, that is what I claimed as due me. Q. Why did you not ask for a written acknowledgment of that? A. Well, we were socially connected so closely that I trusted him to manage the affairs. I didn't think there was any danger in going off and leaving it without any acknowledgment. Q. You knew at that time that the acknowledgment which he gave did omit that? A. Yes, sir. Q. And you made no objection? A. I didn't make any objection to that at that time. Q. Do you think you would recognize the paper that you applied — him to make afterwards which included everything that you wanted the acknowledgment of? A. I think I would. Q. You intended to put in that everything that you thought you were entitled to, did you not? A. Yes, sir. Q. Had you then got any suspicion of Mr. Lawrence? A. No. Q. It was merely for your own satisfaction? A. Yes, sir. Q. In order that your entire interests would be represented on paper? A. Yes, sir. Q. And that is the reason that in that paper you included the $5,500? A. Yes, sir.
323 Q. Won't you look at that I now show you and say if you don't recognize that? (Paper handed the witness.) A. Was there any paper accompanying this in your possession? Q. I am not on the stand. Do you recognize that? A. That is my handwriting. Q. Is that the paper you sent him? A. That is one of them. Q. And did you send another? A. I think there was another accompanying it. Q. And is this the one? A. Yes, sir. Q. Then there were two papers? A. Yes, sir. Q. Which you sent him a couple of years afterwards? A. Yes, sir. Q. Intending to get a written declaration from Mr. Lawrence that would cover your whole interest? A. Yes, sir. Q. Now, you say, do you not, that there is nothing in either of these papers about the $5,500; it is one-eighth of $23,587.50."

Then some talk between counsel. Passing on:

"Q. You intended, then, to make this one-eighth of the whole mortgage? A. I must have been figuring for one-eighth. Q. Your purpose was in sending these to get a declaration of him that would cover your whole interest, as you claimed? A. As I thought it was. Q. As you believed it to be? A. As I thought it was at that time." Was that true that that was your purpose in sending these two papers, to obtain Mr. Lawrence's signature to them, to get a declaration that would cover your entire interest?

A. I don't think—I found I didn't mention that salary ac-
324 count in that paper.

Q. But you testified in New York that your purpose in sending those two papers to Mr. Lawrence some time subsequently to November 9th, 1872, was to get a declaration signed by him which would cover your entire interest. That is what you swore to. Was it true?

A. No, sir.

Q. Why did you send it, or send them, rather?

A. The purpose was to get a declaration referring to the Detroit real estate in one and the money loaned here on——

Q. (Interrupting.) In another?

A. In August in another.

Q. Why did you want them in two separate papers instead of one?

A. Because they were two separate and distinct—segregated, perhaps. That is what I was thinking about it.

Q. You would sooner have them in two separate papers than all in one?

A. Yes, sir.

Q. That is the only reason?

A. That is the only reason that I can now think of, and I think that was enough reason.

Q. In New York you thought it was to get a declaration that would cover this $5,500, didn't you?

A. I had forgotten when I was in New York.

Q. Did I understand you to say a few minutes ago that you thought your declaration—the one that Lawrence handed you—was correct in mentioning $23,587.50, and that Mr. Wood's was wrong in mentioning $25,000?

A. I didn't know nothing about Mr. Wood's. I say that mine was correct, being one-eighth of the money loaned and one-eighth of the property, and on that basis we settled with Mr. Lawrence.

325 Q. It was correct in saying one-eighth of $23,587.50?

A. It would be one-eighth of the loan.

Q. That, you think, was correct?

A. One-eighth of $23,587.50 was what Mr. Lawrence told us he had loaned the company in August.

Q. If you thought that was correct why did you ask him in this paper which you subsequently sent to him and which has just been shown you to give you a declaration saying that you were entitled to one-eighth of $25,000?

A. Well, knowing that my interest was the same as Mr. Wood's, and there was some—we couldn't account for the difference between the $23,587.50 and $2,000 additional—the $27,000 he said he brought back; there would be a residue he hadn't accounted for.

Q. But if you thought $23,587.50 was the correct amount, and that was expressed in the declaration he handed you, why, when you came to write him a paper to sign subsequently expressing your interest, did you put it an eighth of $25,000, which you did not think was right?

A. I have stated the reason in this last answer, that he said he had $27,000 that he had obtained from Mr. Ward, and whether I had learned subsequently, after he had made that statement, that there was $600 more, having discounted the note at 8 per cent., or not, I am unable now to say, but we might have been figuring on that and I might have understood that he took that $600 for his expenses from here to Detroit and return and came back with $27,000. Then he appropriates $23,587.50 of it to replace the money

loaned in August and said he has $2,000 remaining, and we found there was more than $2,000 remaining, and on that basis of
326 figuring and through that figuring by myself I concluded that inasmuch as he had given Mr. Wood a declaration of twenty-five thousand, knowing that his interest was to a cent like mine, that I ought to have the same interest, and that was the way I account for making that twenty-five thousand.

Q. What $600 are you talking about?

A. The six—if you discount a note of $30,000 at 8 per cent., then you would have paid $27,600 remaining, would you not?

Q. Well, what of it?

A. Well, then, Mr. Lawrence would have paid to him $27,600.

Q. How would that make the difference? Your proportion of that $600 would not make the difference between one-eighth of $23,587.50 and $3,125, would it?

Q. What say?

Q. Your proportion of that would not make the difference between one-eighth of $23,587.50 and $3,125 which you asked him to acknowledge?

A. It might not to a few dollars, but inasmuch as he had given Mr. Wood a declaration of twenty-five thousand, I considered that there was a little that hadn't been accounted for of that Ward transaction. How Mr. Lawrence should have given Mr. Wood his declaration for twenty-five thousand without it might have occurred that way I am not able to state.

Q. What I can't understand is how six hundred added to 23,587 would amount to twenty-five thousand. If you add the $600 to the $23,587.50 you have $24,187.50 instead of $25,000. So why is it that you were asking Lawrence to give you a declaration to the effect that you were entitled to $3,125, which is precisely one-eighth of $25,000? What figure does the $600 cut in that?

327 A. Well, that would have to be included to make an interest in $25,000.

Q. It wouldn't make $25,000 if you added it. He represented to you that the debt was $23,587.50?

A. Yes, sir.

Q. You say you thought he might have misled you and Mr. Wood, and instead of receiving $27,000 from Ward he may have received $27,600?

A. Yes.

Q. If so, there would be $600 more to account for?

A. Yes.

Q. You add that $600 to the $23,587.50, and it makes $24,187.50, and yet you are asking Lawrence in this paper that you sent him to give you declaration that you were entitled to one-eighth of $25,000. How did you arrive at that?

A. Well, I might have wanted that on account of his giving Wood the same.

Q. Do you remember anything about it; isn't it the truth that you don't remember anything about it?

A. About writing that paper?

Q. About why you wrote it.

A. No.

Q. How did you get that?

A. That including the—if the note was discounted at eight per cent. it would have left in Mr. Lawrence's hand $2,013.50 that was not distributed.

Q. And he did distribute two thousand dollars?

A. Well, I admit that he distributed two thousand dollars and I include that now; then there would be left still $2,013.50 that never was distributed.

Q. How so? Hadn't he put up a note of $25,000? Didn't he have to take up $25,000 in his own note?

Mr. BENNETT: And what became of this note?

328 A. The discount of the $30,000 note would leave in this possession $27,600, and he came back and appropriated $23,587.50, money he had previously loaned, and distributed $2,000 to Whitney and Wood, and there remained in his hands then $2,013.50, and that is the way I figured my—I thought that he might have included that in Mr. Wood's declaration and I was entitled to the same.

Q. Discounting the $30,000 note at eight per cent would leave $27,600, would it?

A. Yes, sir.

Q. He took $25,000 out of that to take up his own notes, didn't he?

A. Yes, sir.

Q. That would leave $2,600?

A. Yes, sir.

Q. And he distributed two thousand dollars between Wood and yourself, didn't he?

A. Yes, sir.

Q. That would only leave $600, wouldn't it?

A. Yes; but the way I figure it is this way, that he came back and appropriated $23,587.50.

Q. Yes; but you knew, did you not, that while he only charged the company with $23,587.50 that he had put up his own notes for $25,000 and that it would cost him $25,000 to take it up again?

A. That is right; then I might have overlooked that matter and he may have overlooked that matter when he wrote Mr. Wood's declaration, and I am unable to account how the two should be of different sums.

Q. Can't explain that?

A. No, sir; I figure it in this way: I take the $23,587.50 and the $2,000 distributed to us and that makes $23,587.50; that taken from $27,600 leaves $2,013.50 remaining that never had been dis-

329 tributed, but if you take it your way, figuring the $25,000 note, you will come out with different results.

Q. Why, then, didn't you ask one-eighth of the full amount instead of one-eighth of the $25,000, if that was what you were figuring on; it would — one-eighth of $25,613; why didn't you ask for that instead of one-eighth of $25,000?

A. Well, he had been to Detroit, and, as I understood, incurred some expenses in coming down and going back, and in such a transaction as that we were always willing to contribute and he was willing to contribute to anything that any of us was interested in in that matter as well as Mr. Wood and I was.

Q. Mr. Whitney, you had become somewhat suspicious of Mr. Lawrence at an early day, had you not?

A. No, sir; not that I remember anything about.

Q. As early, at least, as the time when you sent him these two papers, whenever that was?

A. I don't think I have ever been suspicious of Mr. Lawrence.

Q. Didn't you testify in New York that you thought he had been misrepresenting matters to you?

A. No, sir; not as I remember.

Q. Well, in substance that; didn't you give as a reason why you sent these papers that you were suspicious of Lawrence?

A. I don't know that I have ever been suspicious of Mr. Lawrence.

Q. I am asking you whether you so testified.

A. I can't say.

Q. Didn't you testify to this in New York: "Q. But you have stated above on your direct examination and cross-examination that he did distribute two thousand dollars. A. He did; after
330 seeing where he dates back and makes the entry on October 3rd (you called my attention to that)—that is, from his manner of keeping those books we began to discover that he, perhaps, had paid himself off instead of dividing with us. Q. He did divide the two thousand with you, didn't he? A. Yes, sir; but perhaps there was a little more coming to us. Q. And that is the way you explain this paper? A. That is the only explanation I can possibly give of it."

Q. Didn't you there mean to be understood as saying that you had become suspicious of Lawrence?

A. No, sir. Maybe——

Mr. BROWN (interrupting): He didn't say he was.

Q. (Reading.) "After seeing where he dates back and makes the entry on October the 3rd (you called my attention to that footing), from his manner of keeping those books we began to discover that he, perhaps, had paid himself off instead of dividing with us."

A. Yes.

Q. Now, if you began to discover that, weren't you suspicious of him?

A. When I noticed that on the book perhaps I was. I thought it was a very strange way of entering accounts.

Q. When did you discover that on the book?

A. Probably that next spring after I returned.

Q. And didn't you know at the time that he dated that check back, and didn't he explain to you?

A. He told me it was dated back.

Q. So you knew at the very time of this transaction, before the

check was drawn at all, that he was going to date it back, didn't you?

A. Yes.

Q. Then why should the subsequent discovery of the fact
331 that he had dated it back make you think perhaps he hadn't divided with you?

A. Looking over the entries in those books might have caused me to figure a little.

Q. Did you get my answer?

A. No, sir.

Q. How long was it after the 9th of November *was it* that you sent these papers to Mr. Lawrence?

A. Well, I stated that it was a year or two years.

Q. What do you say now?

A. Well, I say it is about a year.

Q. Where was Mr. Lawrence then?

A. As near as I can remember, he was—these papers were directed to him at the Sherman house, in Chicago.

Q. Where were you at the time?

A. In Salt Lake City.

Q. Who prepared those papers for you; do you know?

A. I wrote them myself.

Q. Are you sure of that?

A. Yes, sir.

Q. You were not sure of it when you testified in New York, were you?

A. No, sir.

Q. What has refreshed you- memory since?

A. By the handwriting of those——

Q. Your uncertainty in New York was whether or not somebody had not drawn them up for you and you copied them, wasn't it?

A. I don't think there was any uncertainty about it. I think the testimony shows that. I think I stated I wrote them.

Q. Did you ever get a reply to the letter in which you forwarded these papers to Mr. La-rence?

A. No, sir.

Q. You saw him afterwards, of course?

A. Yes, sir.

Q. Did you ever speak to him about it—ask him why he
332 hadn't signed those papers and sent them back to you?

A. No, sir.

Q. Did you never mention it to him afterwards?

A. No, sir.

Q. Did you ever try to get the correction made?

A. No, sir.

Q. The paper that he originally gave you and you wanted another?

A. I was satisfied enough to hold onto it.

Q. You were not satisfied with it, and therefore you prepared others and sent them, did you not?

A. I did at that time.

Q. And he paid no attention to them?
A. I never knew that he received them.
Q. He paid no attention to them, so far as you know?
A. So far as I knew he didn't.
Q. And you never mentioned it to him afterwards, did you?
A. No, sir.
Q. Why did you not?
A. I can't answer that question, why.
Q. Let's see whether you answered it in New York. Did you testify there as follows:

"Q. Did you originate the composition of these Exhibits A 3 and A 4? A. I cannot say that I did. Q. Don't you know that you employed a lawyer to draw them? A. I don't know that I did. Q. Don't you recollect that you did? A. I don't think I did. Q. Are you a lawyer yourself? A. No, sir; I don't think I had any lawyer at that time. Q. Did you copy it from some other papers?
A. I might have done. Q. Who wrote the originals from
333 which you copied? A. I couldn't say. Q. Was Mr. Wood with you when you prepared these papers? A. No, sir. Q. Where were you when you prepared them? A. I was in Salt Lake City."

Weren't you uncertain there whether you prepared them yourself or not?
A. I might have been.
Q. Now, when was it you had the conversation with Mr. Lawrence about the foreclosure of the mortgage that you testified to in your direct examination?
A. I think in August, 1874.
Q. That is the time the foreclosure suit was commenced?
A. Yes; it had been commenced before there was any conversation.
Q. Where was the conversation?
A. In Salt Lake City.
Q. Whereabouts?
A. In an office in the Kimball block.
Q. Who was present?
A. Joab Lawrence.
Q. Who else?
A. No one.
Q. I am speaking of the conversation that you testified to in your direct examination when you and Mr. Wood were present.

Mr. BROWN: About what?
Mr. DICKSON: About the foreclosure of that mortgage and compromise.

A. That was in the Townsend house.
Q. When?
A. On the 16th day of November, eighteen hundred and—somewhere in November. I can't say whether it was the 16th, 17th, 18th, 19th, or 20th—somewhere along there—of November, 1875—1874.
Q. 1874?

A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir.
Q. How do you fix that date?
334 A. By having gone to the—to some memorandums of the hotel register at the Townsend house. I am unable to say which.
Q. Was there any hotel register of the Townsend house that showed when you had a conversation with Lawrence?
A. It showed when Mr. Wood was here, and that is the time the conversation occurred, because Mr. Wood came from Massachusetts on his way from San Francisco and stopped here.
Q. Don't you know that Wood said it was in 1875 and not 1874?
A. I don't know whether he says so or not; I say 1874.
Q. Now, what was that conversation?
A. As near as I can remember, it was 1874; it might have been 1875.
Q. By the way, didn't you testify before that it was 1875?
A. I can't say.
Q. Do you know whether it was 1874 or '5?
A. I would not say now.
Q. What was the conversation?
A. But it is my opinion *is* that it was in the fall of 1874. It might have been in the fall of 1875.
Q. What was the conversation?
A. We was in Mr. Lawrence's room with him, Mr. Wood and Mr. Lawrence and myself being present, when there was some talk made about the foreclosure of this mortgage and prosecution of the foreclosure, when Mr. Lawrence remarked, saying that this mortgage of ours—"It won't do to fight it," he said; "a compromise is what we want, gentlemen, and I think we had better compromise, if we don't get over twenty per cent., rather than fight it."
Q. Twenty per cent.?
A. Twenty per cent. of the Eureka Hill Mining Company
335 shares.
Q. Did he say that?
A. Yes, sir; he was speaking about a compromise of that company, and he thought we had better take twenty per cent. of the shares of that company than to fight this litigation.
Q. Go ahead.
A. I remarked that I didn't believe in any compromise at all: "If that mortgage won't take the whole mine, why let her fall." He says, "Don't be so fast, Mr. Whitney." He says, "A half-loaf is better than no loaf at all." And he says, "Those fellows may know more about the mortgage than we think they do."
Q. Did you ever testify to that before?
A. I can't say whether I did or not.
Q. You never testified to that remark before, did you, Mr. Whitney?
A. I can't say.

Q. Have you any recollection of ever having testified to that remark before?

Mr. BROWN: Before just now?

Mr. DICKSON: Before yesterday.

A. I don't remember.

Q. Go ahead.

A. And then, soon after finding that he was willing to compromise for twenty per cent. of the Eureka Hill Mining Company shares, went over and saw Mr. Bennett and asked Mr. Bennett what his folks proposed to do in regard to a settlement of the mortgage claim. Mr. Bennett said that he had had a talk with his men and they had concluded to give Mr. Lawrence thirty per cent. I said to
336 Mr. Bennett, "You can't settle with him for no thirty per cent., and I doubt whether you can for any fifty per cent."

Q. Go ahead.

A. And then I called again. I think Mr. Bennett requested that I come again, saying that he would see his men and have another talk, and I did call again at his request, and his answer was, "The ultimatum is thirty per cent." I left Mr. Bennett's office and reported—in fact, both of those interviews to Mr. Wood and Mr. Lawrence—the first one to Mr. Wood and Mr. Lawrence and the last one to Mr. Lawrence, Mr. Wood having gone on to San Francisco.

Q. Is that all?

A. That is all I remember.

Q. I see in your New York deposition you fix that as having been in December, 1875. When was that conversation?

A. That was, I think, in December, 1875, along about that time.

Q. Who was present at that conversation?

A. William H. Hood had come in from the East and remained there probably a week, and during his stay we had this consultation in Mr. Lawrence's room in the hotel, as I have stated.

Q. Haven't you and Mr. Wood talked over that conversation repeatedly since you contemplated bringing this suit?

A. Let me answer it, if you will permit me. Having stated in New York that that was in 1875, in December, I thought, I will now change my testimony I have just given and say that it was November, 1875.

Q. And you say about the 16th?

A. Yes, sir.

Q. I see that is the very date fixed by Mr. Wood, the 16th day of November, 1875.

A. Yes, sir.

337 Q. I say now, haven't you and Mr. Wood repeatedly discussed with each other that conversation and refreshed each other's memory?

A. I have not met Mr. Wood since January, 1873, until I met him in San Francisco the 20th day of September or October 1888.

(Question read.)

A. 1875—that was the last time I saw Mr. Wood.

Q. Have you by letter——

A. (Interrupting.) I was thinking about the time that he resigned his office in the company.

Q. When do you fix the time that you last saw him prior to September, 1888?

A. At that meeting.

Q. When?

A. In November, 1875.

Q. Now, have you by letters refreshed each other's memory or endeavored to do so about that conversation that you had?

A. I don't think I have. I don't know that I have.

Q. Let me read to you. You say you have read Mr. Wood's deposition. I find that he says that when——

Mr. BROWN (interrupting): Are you going to read from Mr. Wood's deposition to him?

Mr. DICKSON: From his own and Wood's, too.

Mr. BROWN: I object to your reading from Wood's.

Mr. DICKSON: I want to ask him how he came to get the exact language that Mr. Wood used in his deposition. (Reading:) "Mr. Lawrence replied, saying, 'Whitney, you don't want to be hasty in this matter.' That is what Mr. Wood said. You say in your New York deposition, I find, 'He says, Well, now, Mr. Whitney, you don't want to be too hasty in that conclusion.'"

Mr. BROWN: I object to that question on the ground that this witness cannot be cross-examined as to Mr. Wood's deposition.

338 Mr. DICKSON:

Q. Didn't you get that from Mr.——

Mr. BROWN (interrupting:) If that is a subject of comment, the proper place to comment upon it is in the argument.

Q. Didn't you get that expression from Mr. Wood?

A. No, sir.

Q. Did you give that expression to Mr. Wood?

A. I will tell you how Mr. Wood got it.

Mr. BROWN: No; you are not required to answer for Mr. Wood. I object to that.

Q. Did you get that expression of Lawrence's language from Mr. Wood?

A. What it expressed in there?

Q. When you said in this deposition that you *have* in New York that Lawrence said to you, "Well, now, Mr. Whitney, you don't want to be too hasty in that conclusion," did you get that from Wood or was it your own independent recollection?

A. That was what I stated in New York city.

Q. Was it your own independent recollection of what Lawrence had said?

A. It was.

Q. Unaided by anything Mr. Wood had told you?
A. Yes, sir.
Q. Did you give that expression to Mr. Wood?

Mr. BROWN: I object to that.

Q. Did you tell Mr. Wood at any time before he gave his deposition that Lawrence said in that conversation, "Well, now, Mr. Whitney, you don't want to be too hasty in that conclusion?" Did you ever write or tell him that?
A. I did not.
Q. Did you ever write it to him?
A. I did not see him and I didn't write to him; Mr. Alexander & Green——

339 Mr. BROWN (interrupting): Wait a moment. Just keep your volunteering to yourself?

Q. When next, now, after November, 1875, did you have any conversation with Mr. Lawrence about a compromise of that foreclosure suit, if you ever had any?
A. I think in 1876.
Q. What time?
A. Received three thousand shares in the mill.
Q. How is that?
A. I think it was in 1876 he told me he received 3,000 Eureka Hills Mining Company shares and the mill property.
Q. What time in 1876 did he tell you that?
A. Some time in the summer or fall.
Q. From November, 1875, when you had this conversation, you never had any further conversation with Lawrence about it until after the matter had been consummated, then, and he told you he had received 3,000 shares of stock?
A. Yes, sir.
Q. In consideration for his interest in that mortgage.
A. Also soon as he came to an agreement with Mr. Bennett he told me he had made a compromise whereby the foreclosure should go on and the title should be perfected under that mortgage and he was to have three thousand shares in the mill.
Q. Three thousand shares of the Eureka Hill Mining Company's stock and the old Eureka Mining Company's mill?
A. Yes, sir; and in 1877—1876 or 1877—he told me that he had received it.
Q. That he had received the shares and the mill?
A. Yes, sir.
Q. And he told you, also, that he had sold the mill, did he not?
A. Yes. He sold a piece of the machinery—some parcel
340 or part, portion of the machinery—to McIntyre.
Q. And sold some to somebody else. Who was that?
A. Well, along after that he told me he sold some to Silver Reef.
Q. He told you that also in 1877, did he?
A. Yes, sir; and I think a man by the name of Nesbitt had sold

the machinery under a judgment, and whether he gave him the remnants after McIntyre's——

Q (Interrupting.) Just state what you remember, and not what you don't remember. Didn't he tell you in 1877 that he had come into possession of the mill in the compromise?

A. Yes, sir; some time during a year or two; during that time—1876 or 1877.

Q. Didn't he tell you in 1877 that he had disposed of a portion of the machinery to McIntyres and some portion of it had been sold to go to Silver Reef?

A. I so stated.

Q. Isn't that true?

A. I don't -now.

Q. Isn't it true that he told you that?

A. Yes.

Q. In 1877?

A. Yes.

Q. Did he tell you how much he got for it?

A. I don't think he did.

Q. Did you ask him?

A. I don't remember.

Q. Why didn't you ask him for your part of the cash that he had received then?

A. I can't say.

Q. Why didn't you ask him when he told you that he had received this mill in part compromise, and that he had sold it—why didn't you ask him how much he had sold it for, so that you might know how much was coming to you?

A. For the simple reason that Mr. Packard was carrying
341 on the developments of the mining property—the Eureka Hill Mining Company—and Mr. Lawrence told me that sometimes they were a little ahead and sometimes they were away behind; that if they was behind, why Mr. Lawrence might possibly be contributing something for the development of that mine.

Q. This, now, is in 1877. He didn't get the stock until —?

A. No.

Q. And in 1877 he told you that he had sold that mill?

A. There was developments going on on the property.

Q. They couldn't have been running ahead nor behind, either one way or the other, between the time that he got his stock in March, 1877, and when he had this conversation with you, to any extent, because it must have been immediately, almost, afterwards, wasn't it?

A. In a few months.

—. ——?

A. In 1877 he told me that.

Q. Now, why didn't you, when he told you he had sold that mill and you understood it was part of the compromise, why didn't you ask him how much he sold it for?

Mr. BENNETT: And ask for an accounting.

A. He may have told me.

Mr. DICKSON:

Q. You say here that he never did tell you, don't you? I read now from your Salt Lake deposition——

A. (Interrupting.) I don't remember whether he did or not.

Q. Didn't you testify in Salt Lake as follows:

"Q. Have you ever had any talk with him as to what he did with the mill property since? A. I think he told me once that he had disposed of a portion of the machinery to McIntyre, and some portions of it had been sold to go to Silver Reef, but never told me what he got for it."

342 A. Maybe that is a fact.

Q. Why didn't you ask him how much he got for it, if you thought any part of it belonged to you?

A. I never thought that any part of it belonged to me.

Q. Didn't you think that a part of it——

A. (Interrupting.) I never insisted on any part of it.

Q. Didn't you testify that that belonged to you as much as any portion of the 3,000 shares of stock?

A. It would naturally belong to me.

Q. Just as much as any part of the stock, wouldn't it? Then when you understood that he had sold that mill property in which you had an interest, why didn't you ask him how much he got for it?

A. I am unable to state now why I didn't sit down and have an accounting.

Q. Did you ever, from that day to this, or from that day, rather, to the day of his death, ask him how much he got for it?

A. For the mill?

Q. Yes.

A. I don't think I have.

Q. Did you ever take anything by inquiring of the people at Silver Reef or of the McIntyres or anybody else to ascertain how much he got for it?

A. No, sir.

Q. Don't you know that that he sold to the McIntyres sold for over four thousand dollars in cash?

A. I don't know.

Q. You don't know a thing about it?

A. No, sir.

Q. And you have never tried to inform yourself, have you?

A. No, sir.

Q. And you can't tell why you did it?

343 A. I presumed that Mr. Lawrence would make an accounting of it. I don't know what the rents have been of the Mansion house, either.

Q. You can't give any reason why you didn't ask him when he sold it?

A. No, sir.

The COURT: That mill spoken of as being sold for them, was that property belonging to the Eureka Hill Mining Company?

A. No, sir; the old——

Mr. BENNETT: The Eureka Mining Company of Utah.

Mr. DICKSON: And in the compromise with the Eureka Hill Mining Company, Lawrence got 3,000 shares of stock and this old mill company's mortgage.

Thereupon court adjourned until Monday, June 30th, 1890, at 10 o'clock a. m.

MONDAY A. M., *June 30th*, 1890.

JOHN N. WHITNEY being recalled, the cross-examination was resumed by Mr. Dickson as follows:

Q. Mr. Whitney, shortly before the compromise of the foreclosure suit and up to that time you had a very high opinion of the value of this mining property, had you not?

A. No, sir.

Q. Considered it worth many hundreds of thousands of dollars?

A. No, sir.

Q. Didn't you shortly before?

A. No, sir.

Q. In the latter part of 1875, didn't you consider it worth a million?

A. No, sir.

Q. Didn't you so represent in a communication to Lawrence, that it was worth a half a million over and above the Wells-Fargo
344 mortgage and the Lawrence mortgage?

A. I don't remember that I did.

Q. I will ask you to look at that paper which I now show you.

Mr. BROWN: What is the date of it?

Mr. DICKSON: February, 1875. I want to follow it down with some others on the same subject.

Q. Is that your handwriting?

A. Yes, sir.

Q. Just look at the next page and see if that is a part of the same letter and signed by you.

A. Yes, sir.

Mr. DICKSON: I will ask to have this marked for identification.

(Said paper *as* marked Exhibit 11 for identification, third district court, June 30, 1890. Whitney *vs.* Fox. F. E. McGurrin, stenographer.)

—. I will also ask you to look at this and see if that is a letter written by you to Mr. Lawrence, dated June, 1875.

A. Yes, sir; that is my writing.

Q. Signed by you?

A. Yes, sir.

Q. Just look at the last sheet.

A. Yes, sir; signed "Whitney."

(Said last-mentioned paper was marked Exhibit 12 for identification, third district court, June 30th, 1890. Whitney *vs.* Fox. F. E. McGurrin, stenographer.)

Q. Didn't you in 1875 have a very exalted opinion of the value of this property?

A. I might have had a better opinion about that time than I had previous or a short time before.

Q. Didn't you at that time think that the property was worth more than half a million?

A. I don't think I did.

Q. That it would pay dividends?

A. I don't think I did.

Q. On more than half a million—good dividends?

A. I didn't know that it paid any dividends.

345 Q. Wasn't that your opinion about that time, that it would pay a good dividend on that amount?

A. No, sir; I don't think it was.

Q. In this letter of February 21st, 1875, from you to Mr. Lawrence, did you write of the mine as follows: "As I wrote you recently that I had sent a practical miner to examine the property and to report to me the facts regarding the development being made, the amount and quantity of ore being extracted from the mines on Eureka hill, what was being done with the same, how many men employed, and his opinion as to the future for a valuable mine. He was familiar with the property and all its workings in 1871–'2, and expresses himself in this manner: That forty-five men are employed in the form of lease, receiving one-half of the ore, staking out ore nearly all the distance from the Beck shaft to south end of the property, fifteen hundred feet in length, and that the men frequently opened out very rich bodies of ore. I have lately learned of a rich development being made near the south end, the ore going $3,000 per ton. The men, of course, are making good wages," and so on. Did you write that?

Mr. BROWN: I object to that question on the ground that it is irrelevant and immaterial what his opinion of the value of the property was, and that that is not proper way to examine the witness as to the contents of the letter. If he acknowledges the execution of the letter, the letter itself is the better evidence of what it contains.

Mr. DICKSON: I want to call his attention to another passage.

Q. Did you write in that letter to Mr. Lawrence as follows: "The property is of greater value now than in 1872 and 1873, when people considered it worth two or three millions of

346 dollars. From what information I am able to gain about the property, it would be a bargain if the property could be secured for, say, five hundred thousand dollars outside the mortgage and Wells, Fargo & Co. claim. On this basis good dividends might be expected to be realized regularly."

Mr. BROWN: I object to that; the letter speaks for itself, whether

he wrote it or not, and the other objections already made, that it is immaterial and irrelevant.

Q. If you did write that, did you believe it to be true at the same time?

I object to that for the same reason—entirely irrelevant and immaterial.

The COURT: How does that become material, Mr. Dickson?

Mr. DICKSON: I had sooner explain a little further on after I get past the point with the witness.

The COURT: You don't care to disclose the point now?

Mr. DICKSON: Not just now.

The COURT: Well, he may answer the question.

A. Only from what the man that I sent over to get information from by his examination.

Mr. BROWN: I except to the ruling admitting it.

Q. Didn't you urge Lawrence during the year 1875 to buy up the Wells-Fargo claim, assuring him that he would be entirely safe in doing so because of the valuable mine that there was there?

Mr. BROWN: I object to that as immaterial.

The COURT: I don't see how that becomes material, because if he did buy it——

347 Mr. DICKSON: He didn't buy the Wells-Fargo claim at that time.

The COURT: Of course, he having written a letter, the letter shows for itself what he said. Now, if it can be shown that he made any representations different from that——

Mr. DICKSON: I expect to offer the letters themselves later on, and I am calling his attention to these statements in the letters the same as though he had made statements out of court which are inconsistent with the statements here now.

Mr. BROWN: The matter is entirely irrelevant and immaterial. He could not impeach on any such matter.

Mr. DICKSON: It may have some materiality after the evidence is all in. He may answer the question. Of course if it should turn out that it is not material, it don't make any difference. It is not impeachment if he should contradict the statements.

Q. I want to call your attention, Mr. Whitney, to a passage in the letter from you to Lawrence which you have identified, being under date of June 25th: "I would lose no time in taking some action to acquire this property now. If Wells, Fargo & Company can be negotiated with and their title acquired, the Detroit trade can be made on much better terms than offered last winter, when I think you will be safe, as the mine is looked upon as one of the best here. Woodworth estimates value $500,000; mine was a hundred thousand and fifty thousand developments." Was that your estimate of the value of the property at that time?

A. Fifty thousand dollars?

Q. One hundred and fifty thousand dollars?
A. I cannot say, sir.

Mr. BROWN: That don't say one hundred and fifty thou-
348 sand dollars?

Q. Well, $100,000?
A. I couldn't say, Mr. Dickson.
Q. Didn't you, as a matter of fact, think it was a very valuable mine at that time?
A. Well, if you will allow me to answer——
Q. (Interrupting.) I want you to answer. Didn't you consider it a very valuable mine at that time?
A. If you will allow me to explain in my own way I will answer it.
Q. Answer it yes or no; you know whether you did or not.
A. Wells, Fargo & Company were taking out ore——
Q. (Interrupting.) Wait.
The COURT: Answer the question, if you can.
Q. Didn't you consider the mine through the year 1875 to be a very valuable property?
A. It was producing more ore at that time than it ever had before.
Q. Did you at that time consider it a very valuable property?
Mr. BROWN: What do you mean by "very valuable"?
Q. Well, worth a hundred thousand dollars or upwards.
A. It is pretty hard to estimate what it might be worth; any mine might have been improved on its value of the product of the ore and Wells-Fargo working.
Q. My question is a very simple one. Didn't you during the year 1875 regard this mine as exceedingly cheap at a hundred thousand dollars, if it could be secured for that sum?
A. I evidently considered it of more value than it was in 1871–'2.
Q. Didn't you consider at that time, during the year 1875, that the property would be cheap at one hundred thousand dollars? Now, answer that yes or no.
349 A. It is so long ago I can't say what I did consider. I was always answering Mr. Lawrence's inquiries.
Q. In 1879 didn't Mr. Lawrence inform you of a strike that had been made in that mine?
A. I can't say that he did.
Q. Didn't you testify so in New York?
A. I disremember.
Q. Don't you remember what you testified there about that?
A. I do not.
Q. No recollection at all?
A. No, sir.
Q. Have you any recollection at all of Mr. Lawrence in 1879 or
1880 informing you that a strike had been made in the mine of ore?
A. No, sir.
Q. And having a conversation with him about it?

A. Yes, sir; he told me there had been one dollar dividend declared by the company in 1879—I think it was in 1879.

Q. Now, in that same conversation didn't he tell you that he had been removed as an officer of the company and that his means of information then were very meagre?

A. I think that was after.

Q. Removed as an official of the company and that his means of information were meagre?

A. He once told me that.

Q. Wasn't that in 1879 or 1880?

A. I think it was in 1879 or 1880.

Q. Didn't you testify to that in New York?

A. I think I did.

Q. That in 1879 or 1880 he told you that?

A. Yes.

Q. That he had been removed—kicked out—and couldn't find out much about the mine?

A. Yes.

Q. That was in 1879 or 1880?

A. Yes; one of those years; about that time.

350 Q. And in that conversation he told you there had been a dollar dividend?

A. I cannot say that it was that conversation. It was in 1879, as near as I can remember, that he said a dollar dividend had been declared.

Q. Now, knowing a dollar dividend had been declared and having been informed by Lawrence that his means of information as to the condition of the mine were unsatisfactory, did you make any inquiries of anybody else, any official of the company, to ascertain its condition—what it was doing?

A. No, sir.

Q. Why didn't you?

Mr. JUDD: I object to that manner of examination. The attorney has a right to ask him for facts, but he has no right to sit there and ask him why didn't you do so and so.

The COURT: I think it is alleged that he didn't know the value of the mine until along about somewhere — 1885 or '6, and that that was one of the reasons, as I understand, why he made no demand for his interest in the stock held by Lawrence. Now, this cross-examination, as I understand, is intended to elicit the fact that he did or had good reasons to know that the mine was valuable and paying dividends a good while before that.

Mr. JUDD: My objection don't go to that at all. He asks him if he made any inquiries, and the witness says he did not. Now, I say he has no right to construct an argument with the witness to ask him why he didn't do so and so.

The COURT: Now, if he had no reason for not then making known his claim to this stock it might become apparent, if he just let it lie and made no claim to it during all of those years,

351 knowing it was valuable and knowing it was paying divi-

dends, it seems to me that it might have some bearing on the case. You may answer the question.

Mr. BROWN: We will take an exception to that ruling.

Q. Why did you make no inquiry after receiving this information of Mr. Lawrence; why did you make no inquiry of any of the officers of the company to ascertain the condition of the property?

A. Not being a stockholder of the company or an officer of the Eureka Hill Mining Company, I wouldn't suppose that I could gain any information.

Q. That is your answer. The company had an office in this city all through these years, did it not?

A. I understood it did.

Q. I am speaking now of the Eureka Hill Mining Company.

A. Yes, sir.

Q. Ever since its organization its principal office and place of business has been in this city, hasn't it?

A. Yes, sir.

Q. You have understood that?

A. I have understood so.

Q. You were acquainted with Mr. Packard all through these years?

A. Yes, sir.

Q. Ever since the organization of the company?

A. Yes, sir.

Q. You knew that he had been one of the officers of the company always?

A. Yes, sir.

Q. You have met him from time to time since you have been in Salt Lake?

A. Yes, sir.

Q. Did you never make any inquiry of him prior to 1885?

A. No, sir.

352 Q. When you came back from Provo—prior to that you never made any inquiry of Mr. Packard?

A. I wasn't speaking to Mr. Packard.

Q. You never made any inquiry of him?

A. No, sir; I wouldn't speak to him until I came back — Provo.

Q. You made inquiry of him in 1885, did you not?

A. Yes, sir.

Q. So that the fact you were not on speaking terms wasn't the reason?

A. I would not go to him—not on hearing the dollar dividend.

Q. When Mr. Lawrence told you in 1879 that a dollar dividend had been declared did you ask him for your part?

A. No, sir.

Q. Suggest to him in any way that you would like to have any of that money?

A. No, sir.

Q. Did you ever afterwards ask him for it?

A. No sir.

Q. Did you from 1879, when you heard there had been a strike in the mine and that it had paid a dollar dividend, ever make any inquiry of any persons until the fall of 1885 to ascertain anything about the condition of this mine?

A. I might have asked individuals about the city here.

Q. Did you?

A. I don't know that I did; I can't remember now.

Q. You have no recollection of it?

A. I don't remember.

Q. In the fall of 1885 you attended the lawsuit in Provo between the Eureka Hill Mining Company and the Bullion Beck Mining Company?

A. I did.

Q. In which, as you understood, the title to the ore bodies was involved?

A. Yes, sir.

353 Q. Both companies claiming them?

A. Yes, sir.

Q. You were then a resident of Evanston, Wyoming, were you not?

A. Yes, sir.

Q. You attended that trial as a witness for the Bullion Beck Company?

A. Yes, sir.

Q. Came from Wyoming here for that purpose?

A. Yes, sir.

Q. Not in obedience to a subpœna, but at the request of counsel for the Bullion Beck Company?

A. Yes, sir.

Q. And testified for the Bullion Beck and against the Eureka, did you not?

A. The Eureka Hill; yes, sir; as to a signature.

Q. Well, your testimony is in. You gave that testimony?

A. Yes, sir.

Mr. DICKSON: I believe you introduced it, did you?

Mr. JUDD: Yes, sir; well, it has not been, but it will be so considered.

Mr. DICKSON: I understood it was in, but not read.

Mr. BROWN: The testimony of Whitney in the Bullion Beck case? Why, no.

Mr. JUDD: We put in the record in the foreclosure case.

Mr. DICKSON: I thought you put in the testimony.

Mr. BROWN: Why, no, of course not.

Mr. JUDD: Yes, it was; it was in his deposition.

Mr. BROWN: Something was asked him on his cross-examination in the deposition.

Mr. JUDD: If he gave that testimony.

Q. Didn't you testify to the veins there being considered two separate veins when you were acquainted with the property?

A. Yes, sir.

354 Q. That is what the Bullion Beck Company was contending for in that trial, as you understood it, wasn't it?

A. I don't know what they were contending for.

Q. That there was two separate veins?

A. I don't know anything about that.

Q. You did testify to that, did you not?

A. I understood probably that there was two veins, one was the Montana and the other was the Eureka, running through that hill when I was managing the property.

Q. And didn't you identify a map showing that there were two veins, and it was not all one, and therefore it did not belong to the Eureka Hill Mining Company?

A. I don't know that I did.

Q. Don't know whether you did or not?

A. Mr. Beck's vein running parallel with it when I was managing the property.

Mr. DICKSON: We ask to have these two pages identified, pages 142 and 143 of the testimony in that case. You admit that that is the testimony given by Mr. Whitney, I suppose?

Mr. BROWN: It is, if you have got the place right.

(Said pages were marked for identification —.)

Q. Do you remember what time in the fall of 1885 you were there?

A. I don't know the month, but I should judge it was November—might have been December.

Q. How long did you remain in the Territory after giving that testimony?

A. Probably not to exceed a couple of days.

Q. Then you were back again?

Q. Went right back to Wyoming.

Q. Then you came back here again, didn't you?

A. I came back later.

355 Q. How long afterwards were you back here again?

A. I can't say now. I disremember.

Q. How long after you were down here as a witness, in November, 1885, if that was the month, was it that you went to Mr. Packard, as the president of the Eureka Hill Mining Company, to ascertain the amount of dividends that had been declared and paid on this stock?

A. I can't say.

Q. Didn't you testify about a month after?

A. I should judge, as near as my memory serves me now, it was about a month later.

Q. So you were here a month or such a matter after you gave that testimony?

A. Yes, sir.

Q. How long did you remain here then?

A. Three or four days.

Q. Mr. Lawrence was here then, was he not?

A. I don't think he was.

Q. Don't you know that Mr. Lawrence was here all through the fall—the latter part of 1885 and early part of 1886?

A. I do not.

Q. Did you make any inquiries to ascertain whether he was or not?

A. I think I did.

Q. If you did, don't you know that he was living right in the house where he had lived for years, in the latter part of 1885 and early part of 1886?

A. I think, as near as I now remember, he was absent from the city.

Q. You do?

A. As near as I now remember.

Q. Can you say that you made any effort to see him in the fall of 1885 or early part of 1886?

A. I think I did.

Q. What effort did you make or what inquiry did you make to ascertain whether he was then in the city living here?

356 A. I evidently went to the office to inquire.

Q. Did you go there to inquire?

A. I can't say.

Q. Can you say that you made any inquiries at all to ascertain if he was here at that time or not?

A. I think I did.

Q. From whom?

A. If I didn't go to the office, I learned by examination on the street that he was absent.

Q. Can you recollect of making any inquiry of any person?

A. I don't know who.

Q. Have you any recollection of making any inquiry?

A. Yes; I think that is positive that——

Q. (Interrupting.) You think you did?

A. Yes, sir; but who it was I can't say.

Q. And you didn't learn that he was right in the city at that time for several months?

A. I learned that he was not, as near as I now remember.

Q. Who told you that he was not here?

A. I don't know who told me.

Q. And you don't know what he was here for three months at that time?

A. I do not.

Q. Continuously living right in the house where he had lived for years?

A. I do not.

Q. You didn't go to his house, did you?

A. No, sir.

Q. Nor to his office?

A. I might have possibly gone to his office if I didn't learn before I got to the office that he wasn't here.

Q. Have you any recollection of going to his office that fall?

A. I have not.

357 Q. Or a month after, when you came back?

A. I have not. If I should have met Mr. Bennett on the street and he said Mr. Lawrence was not in the city, I should have stopped on that information.

Q. Mr. Bennett didn't tell you anything of that kind?

A. I don't remember of meeting Mr. Bennett.

Q. And if anybody did tell you that you have no idea who it was?

A. No, sir.

Q. When did you see Mr. Lawrence after that trip to Provo?

A. The next time I saw Mr. Lawrence was when I went to his office and saw Mr. Fox in the office.

Q. When was that?

A. I disremember now when it was.

Q. About how long after you had been to Provo?

A. Oh, it was a year and a half, I should judge. The following season after going to Provo I think Mr. Lawrence went to Europe and was absent for——

Q. (Interrupting.) You think a year and a half after you were in Provo you saw him?

A. I should think it was that length of time.

Q. At his office?

A. Yes, sir.

Q. In this city?

A. Yes, sir.

Q. How long were you in his company at that time?

A. Oh, I sat there, I should think, for an hour and a half.

Q. You knew, then, that Lawrence——

A. (Interrupting.) Other parties there.

Q. You knew, then, that Lawrence had been lying to you, didn't you?

A. I hadn't heard that he had ever lied to me; I didn't think he had ever lied to me. I never met him. He hadn't told me

358 of any dividends except that one dollar in 1879.

Q. Didn't you testify in New York that you used to see him almost every year?

A. Yes, sir.

Q. Or every year—several times a year?

A. Yes, sir.

Q. And that you always spoke to him about the matter, and that he always said except upon this one occasion that sometimes the mine was a little ahead and then away behind?

A. Yes; whenever I saw him in town—when I was in town I would ask him how the property was coming on, but I don't remember how often I saw him from 1879 until 1888.

Q. Well, every year, didn't you?

A. I don't know that I did.

Q. A number of times?

A. I didn't come here to stay any time during that time.

Q. Didn't you testify over and over again in New York that whenever you saw him you spoke to him about the property and

that sometimes he said it was a little ahead and then away behind?

A. Yes, sir; that was the years prior to 1879, 1880, 1881.

Q. Prior to 1879 and 1880?

A. Yes, sir; and 1881.

Q. Prior to 1881; how was it after that? Did you ever speak with him about it after that?

A. If I met him—I don't remember of meeting him more than two or three times during that term of years from 1882 to 1888.

Q. Well, from 1881 to 1888 did you ever speak to him about the mine—have you any recollection?

A. I think I had one talk with him.

Q. When?

A. When he officed in the building right east of where his office was last.

Q. I don't care where it was; when was it?

359 A. I couldn't say when.

Q. About when—what year?

A. I couldn't say.

Q. About what year?

A. I couldn't say; it might have been 1883 or '4; might have been 1882.

Q. Did you speak to him about the mine then?

A. Yes, sir; that was the time he requested me—and said that he had been kicked out as an officer, and said there was a large amount of ore——

Q. (Interrupting.) That was in 1879, you testified in New York?

A. No.

Q. Didn't you testify in New York that that was in 1879?

A. I couldn't say; it was in the office up there, whatever year it was—when he officed in the old Hooper building; I can't tell what year it was.

Q. Didn't you testify as follows: "Well, after this property had been foreclosed and conveyed to the Eureka Hill Mining Company did you have any further talk with Mr. Lawrence on the subject of the settlement which, you say, — with these Eureka Hill Mining Company people? A. During the year- 1875 to 1883 I probably was in Salt Lake not to exceed about two months of the year; perhaps two or three times a year or four or five times another year; not so often the next, and I called on Joab Lawrence and I would ask him how the property was going on (that is the Eureka property). He was made treasurer and secretary of the new company after the organization. He held that office for a short time only, and I would ask him how the thing was going on down there. Says I, 'Is the mining doing anything—doing any good?' and his reply was always, 'Sometimes it is a little bit ahead and sometimes

360 it is behind, but the times it was paying expenses, at other times it would be away behind, and then it would catch up a little.' Until the year, perhaps, 1879 I was calling on him at his office in Salt Lake City, and he says, 'Whitney, I hear that they have a good big lot of ore down at the Sandy smelting works.' This was

in December, 1879, as near as I now remember. It might have been a year later; it might have been two years later; just as I now go back in my memory. I may be wrong. Q. He said they had what? A. A big lot of ore down at Sandy. 'I wish you would go down and see how much there is and how much the value it has.' He says, 'As I have been kicked out as an officer of the company, I know very little about what has been going on about their matters.' At some annual meeting somebody else was elected in his place and he was out of office." You testified to that, didn't you?

A. Yes, sir.

Q. And didn't you testify there that he always, with one exception, told you that the mine was sometimes a little ahead and then again was away behind?

A. Yes, sir.

Q. When you called on Mr. Packard, a month or such a matter after you were in Provo at that trial, what did you learn from Packard as to the amount of dividends that had been declared and paid to Lawrence on that 3,000 shares of stock?

A. He came and handed me a paper, and think that it said $168,000.

Q. Something like that?

A. Something like that.

Q. That something over $160,000 had then been paid by that company to Lawrence on these 3,000 shares of stock?

A. That was the figures he put on it.

361 Q. Didn't you then come to the conclusion then that he had been deceiving you when he kept repeating to you that the mine wasn't doing anything?

A. I don't know. I always had lots of confidence in Joab Lawrence all my life?

Q. Did you still have confidence in him then?

A. I might have questioned——

Q. (Interrupting.) Didn't you question it?

A. I don't know. I would wait until I saw him.

Q. Didn't you in your own mind doubt his integrity?

A. I know I was quite anxious to get an interview.

Q. Didn't you, when you learned this from Mr. Packard, doubt Mr. Lawrence's integrity?

A. I can't say what was in my mind then.

Q. Well, when you saw him a year or a year and a half after having learned this, how long were you in his presence?

A. That was in the evening, in his own office?

Q. Yes.

A. Well, I think I must have remained in the office there until they went to dinner, probably an hour and a half.

Q. About two hours, you testified in New York?

A. Might have been two hours.

Q. Lawrence there all the time?

A. Yes; he sat there talking with me, and the men came in.

Q. Was there only one room there?

A. No, sir.
Q. How many rooms?
A. One room.
Q. A little room off of it, wasn't there?
A. I don't know of any. There was a little rail that went around where the desk sat.

362 Q. Did you speak to Mr. Lawrence during that two hours about this?

A. No, sir.
Q. Didn't you call him one side and tell *you* what Packard informed you?
A. No, sir.
Q. Didn't you say anything to him about the mine at all?
A. No, sir; I didn't care to talk with him when all those people were calling.
Q. Who all were there?
A. Mr. Merrit came in.
Q. Sam. Merritt?
A. Yes, sir.
Q. How long was he there?
A. Oh, he sat down there for quite a while and talked with Mr. Lawrence and the rest of us. We were in a group there.
Q. Who else was there?
A. I forget who the others was; I stated once who they was, but I don't seem to remember now.
Q. Can't remember?
A. There was two others, I think.
Q. You did state in New York who they were, didn't you?
A. Yes; I just remarked that, but I don't now recall.
Q. Mr. Fox, a son-in-law of Mr. Lawrence, was one?
A. He was in the office; he was inside of the railing.
Q. And Mr. Richard Mackintosh?
A. Yes, sir.
Q. And Mr. Samuel Merritt?
A. Yes, sir.
Q. Those were the three you named?
A. Yes, sir.
Q. Did they all stay there until you left?
A. Yes, sir.
Q. All leave together?
A. Yes, sir.
Q. Lawrence and all the rest?
A. As near as I now remember, they all left the office together.

363 Q. Didn't you testify in New York that after being there a couple of hours or such a matter Lawrence got up to go to dinner?

A. Yes, sir; we all started away from there.
Q. When he started to go to dinner why didn't you start out with him and speak to him about this matter?
A. We all walked off together.

Q. I say, when Lawrence started off to dinner why didn't you walk with him and speak to him about it then?

A. I made up my mind to see him in the afternoon and have an interview privately.

Q. What time was this?

A. Before lunch—before noon.

Q. Before 12 o'clock?

A. Before 12 o'clock; yes, sir.

Q. At all events you made no effort to speak to him at that time?

A. I made no effort to have any private——

Q. (Interrupting.) You made no effort to call him aside and speak to him at all?

A. No, sir.

Q. Did you ever make any demand on him for settlement in your life?

A. I made a demand in New York city.

Q. When?

A. On the 6th day of April.

Q. What year?

A. 1888.

Q. Who was present?

A. Mrs. Lawrence.

Q. You made a demand at that time?

A. Yes, sir; made a demand for an accounting.

Q. How did you make it?

A. In the form of a writing.

Q. State the circumstances.

A. I can't state them.

Q. Why?

A. I don't remember the contents.

Q. I am not speaking of the contents of the writing; state the substance of the interview you had with him; you testified to it twice before?

A. Yes.

364 Mr. BROWN: We will give you notice here to produce that writing, by the way.

Mr. DICKSON: Which writing?

Mr. BROWN: That was left with Mr. Lawrence.

Mr. DICKSON: I have never seen it myself.

Mr. BENNETT: I think it is with the original deposition.

Mr. BROWN: The writing itself?

Mr. BENNETT: I think so.

Mr. BROWN: Or a copy.

Mr. BENNETT: Then I have never seen the original. I supposed the paper attached to the deposition was the original.

Mr. JUDD: It is copy.

Mr. BENNETT: Of course it would not be in our possession; never has been in our possession.

Mr. DICKSON: I withdraw the last question for the present.

Q. Before you went to New York at all and concluded to make a

demand and commence suit, you knew that Lawrence was very ill of softening of the brain, didn't you?

A. I had heard so and I had met Mr. Fox a day or two before I left Salt Lake City and asked him——

Q. (Interrupting.) Just answer my question.

Mr. BROWN: He is answering it, I submit.

A. I inquired of Mr. Fox how Mr. Lawrence was, and in the conversation asked what his address was. I got the information of his address from Mr. Fox. Mr. Fox said that he was a great deal better than he had been, and I had heard of the talk. In answer to your question, I had heard the talk on the streets here that Mr.
365 Lawrence was quite unwell with a paralytic shock. That is all the information I had.

Q. Didn't you believe before you started to New York to make that demand that Mr. Lawrence was very ill of softening of the brain?

A. I had heard that he was quite unwell with that paralytic shock and was in such a state that they didn't dare to bring him back to Utah. The people on the street here—it was talked about the street when I came at that time; that is what took me to New York.

Q. I ask you to look at this letter dated July 14th, 1877, addressed to Mr. Wood, and state if that is yours.

A. Yes, sir.

Q. That is a letter of yours?

A. Yes, sir.

(Said paper was marked Exhibit 14 for identification, third district court, June 30th, 1890. Whitney *vs.* Fox. F. E. McGurrin, stenographer.)

Q. Didn't you before you wrote that letter know that Lawrence was very ill of softening of the brain and liable to die at any time of that disease?

A. I am unable to say.

Q. Let me read to you from it: "He is liable to die at any time of softening of the brain." That is a letter dated July 14th, 1887.

A. I might have had that information. What is the date of the letter?

Q. April or July, 1887—April 14th, I think, 1887.

Mr. JUDD: Was that put in evidence?

Mr. DICKSON: It was a part of the deposition. If that should go out we want the letter in independently. We will offer it when we come to our defence.

366 Q. Now go on and state the interview that you had with Mr. Lawrence on the 6th of April, 1888, just as fully as you can.

A. During my visit there?

Q. That is the only time, isn't it?

Mr. BROWN: I call attention—this is not cross-examination. If the counselor does it, he makes him his own witness.

Mr. DICKSON: I think it is cross-examination, if your honor please. They have put in two depositions made by him, and we ask permission to cross-examine him further upon those depositions, in the event that they should remain in here, as to what he said as to that interview when he made this demand. He has testified to it, and they have got it in. Of course we had an opportunity to cross-examine him there, but we want to cross-examine him further upon it.

Mr. JUDD: The point we make, if your honor please, is this: We don't want any misunderstanding. The gentlemen have got in an exception to the deposition. This is the first they have said anything about wanting to cross-examine him further upon that deposition. It was understood that they were cross-examining him upon his testimony which he had given before the court.

Mr. DICKSON: So we have been.

Mr. JUDD: And if they now leave that and propose to cross-examine him further upon that deposition I want the reporter's notes to show that they are doing it at their request before the court.

Mr. BROWN: Of course the reporter's notes will show it.

Mr. MARSHALL: There is one other point: Mr. Whitney has testified that Mr. Lawrence was his trustee. Now, as cross-examination of that claim, it would be perfectly legitimate to ask him,
367 "Did you ever demand of Lawrence an accounting?" As throwing a doubt upon the trusteeship, we ask him that question. He says, "Yes; I did, April, 1888." Is it not also cross-examination to sift that statement—what was said, how he made the demand, what Lawrence's condition was at that time? It seems to me that that would be within the scope of legitimate cross-examination.

Mr. JUDD: The point is this, if your honor please, and we don't want it lost sight of——

Mr. DICKSON: Just pardon me a moment. I entirely coincide with the view just presented by Mr. Marshall. I think it is legitimate cross-examination of the testimony given here. We don't ask to cross-examine him upon the deposition; we ask to examine him upon this matter as being proper and legitimate cross-examination of his testimony-in-chief to the effect that Lawrence held this property in trust for him.

Mr. JUDD: Now, with reference to that, Brother Brown's position, as I understand him, and mine is this: that they except to any statement made by this witness of any transaction with the deceased where it was equally within the knowledge of both. We haven't gone in by this witness to any transaction or statement concerning which they now propose to inquire. It is at a different time, at a different place, and under different circumstances, and, if they do that, all we want is that the record shall show it is their cross-examination and they make him their witness to that matter.

Mr. DICKSON: The record will show that, of course, anyway.

Mr. JUDD: You have a right to cross-examine him with
368 reference to any question or transaction as to which we ask him; but when you go out, as you did in numberless instances, as you will see when you come to see this record, there you make him your own witness, and that is all we want.

The COURT: Their point is that we have presented an account against Lawrence in his lifetime, and, having then presented it against his estate after his death, that it is legitimate cross-examination to ask him all the particulars about presenting that account and the demand made.

Mr. JUDD: We didn't ask him about that at all.

The COURT: No; you proved, though, the presentation of the account.

Mr. JUDD: We did not; not in this testimony.

The COURT: You offered the deposition containing it.

Mr. JUDD: The gentlemen say now that they do not wish to cross-examine on that. Your honor sees the point. We are trying to keep these two testimonies separate and let each one stand on its own bottom, and your honor must ultimately rule as to the admissibility of the deposition, and we don't want a cross-examination on the deposition mixed up with a cross-examination of this examination.

Mr. DICKSON: No; nor do we. Wouldn't it be perfectly legitimate as suggested by Mr. Marshall——

Mr. JUDD: We don't object to your examining him with reference to this, but if you do you make him your own witness.

Mr. DICKSON: Oh, no.

Mr. BENNETT: That is exactly what we don't want.

369 Mr. DICKSON: It must be so. I think the mere suggestion of it would convince any lawyer that it must be true that where a witness goes upon the stand, as this plaintiff does here, and testifies to a matter of trust and confidence that existed between him and the deceased, by virtue of which the deceased held large property interest in his own name in trust for the witness, he testifies to that in chief—that it is legitimate cross-examination to inquire if he ever made any demand at all through all these eighteen or nineteen or twenty years that he has testified that the trust existed—if he ever made any demand upon his trustee for a settlement or accounting or any inquiry concerning the trust, because if he should say, "No, I never did," it would certainly reflect light upon the case and would have a bearing upon the truth or falsity of the testimony that he had given, because it is not natural—a man knowing that another is his trustee and that he has property of great value in his hands meeting him year after year and allows the years to roll by, a fifth of a century nearly—it would cast discredit upon his testimony that there ever was any trust at all. If, on the contrary, he should say, "Yes, I did make a demand once in 1888," it is legitimate cross-examination to ask him the history of that demand, the circumstances under which it was made, the condition of mind in which the alleged trustee was when the demand was made upon him, whether he could comprehend the

demand, and, it being cross-examination, we are not bound by his statements and we don't make him and are not required to make him our witness in order to sift the truth of his story here,
370 and it does have a direct bearing upon the truth of the testimony as to the alleged trust.

Mr. JUDD: The point is this, if the court please: We don't say that he has not the right to inquire of this witness concerning that matter, but what we say is this: Certain statements of the witness, such as are equally within his and the deceased's knowledge, are objected to by reason of his incompetency to speak to those statements. Now, we enquired of him concerning certain statements. Now, they have the right to cross-examine concerning those statements, because your honor ruled they were competent; but when they go outside of things concerning which each party had equal knowledge of and bring in things concerning which he did not inquire, then they make the witness their witness and their objections to competency hereafter will be of no force.

Mr. BROWN: The rule is a little broader than that; so far as they go outside of the legitimate field of cross-examination, if they do it, we insist that they have made him their own witness and the question will arise hereafter, perhaps.

Mr. JUDD: And the gentlemen will find that they have inquired concerning conversations and transactions with the deceased all through this cross-examination that we didn't inquire of at all.

Mr. DICKSON: No; I have not.

Mr. JUDD: They have no right to do that as cross-examination, and we shall hereafter insist, all other questions aside, that in that they have introduced matters that they cannot now object to on that question of competency. So that all those matters concerning which they inquired may be brought out, we want your honor to rule whether they do it as their own witness and then take
371 the broader ground stated by Brother Brown, that where they go into matters not inquired into with reference to the original examination that it is not cross-examination.

The COURT: Now, originally the testimony of this witness was objected to, when offering the deposition, upon the ground that it testified to matters transpiring between him and the deceased, equally well known to each. Now, of course, of all matters to which he testified on his direct examination a thorough and a very close examination is proper, because if there is any difference between cross-examination, where one would be allowed to be more full than another, this would be a case where it should be very full, for the reason that he makes a case by his own testimony against another party who cannot testify, and to the extent that his testimony is competent that is all right; but a very clear and very searching cross-examination should be allowed, but when they go beyond that and cross-examine on any matter that is not properly cross-examination they thereby make him their own witness and they waive the objection to his competency to testify about those matters. Now, it is for counsel in their cross-examination, at their peril, to notice that they do not do that. Of course after such protracted testimony

as this witness has given in the cross-examination now, which has been going on since Friday afternoon, it is pretty hard for the court to remember just all that the witness testified to on direct examination.

Mr. DICKSON: Well, I will withdraw the question for the present.

The COURT: I am not prepared to say whether that is or is not cross-examination.

372 Mr. BROWN: I do not understand there is any ruling required of the court. We just gave them notice what we should claim hereafter.

Mr. DICKSON: We will withdraw the question for the present.

Mr. BENNETT: Take no risks on this witness.

Q. Alexander & Green were the attorneys of you and Mr. Wood in a suit that was brought in New York against Joab Lawrence?

A. They were.

Q. Did they not send a copy of your deposition as taken in New York to Mr. Wood in San Francisco before he gave his deposition there?

A. I don't know.

Q. Don't you know?

A. No, sir.

Q. Weren't you about to state that on Saturday when Mr. Brown stopped you?

A. I was about to say that he might have obtained information that way, but whether he did or not I am not able to say.

Q. Did you ever hear from them that they had sent a copy of that deposition?

A. No, sir.

Q. Nor from Wood, either?

A. No, sir.

Q. Did you ever see it in San Francisco?

A. I can't say that I ever saw it.

Q. Can you say that you didn't see it there?

A. No, sir.

Q. Don't you know that you did?

A. No, sir.

Q. Don't you think you did?

A. I don't know whether I saw it here, either there in Mr. Sutherland's office. I might have——

Q. (Interrupting.) Don't you think you have seen a copy of your deposition——

A. (Interrupting.) I have seen it somewhere.

Q. Didn't you see a copy of your deposition as given in

373 New York in San Francisco?

A. I couldn't say that I did.

Q. Don't you think you did?

A. I don't know that I did. If I was positive that I did, I would say so.

Q. You will not say that you did not?

A. No, sir.

Q. Did you hear from Mr. Wood that he had received a copy of your deposition?

A. I don't remember that I did.

Q. After the Ward trade criminal proceedings on account of that trade were instituted by Mr. Ward against you and Mr. Lawrence and Mr. Wood, were they not?

A. I disremember whether Mr. Wood was embodied in that suit or not, whether his name was.

Q. Criminal proceedings were instituted against you and Mr. Lawrence?

A. Yes, sir.

Q. By Mr. Ward or at his instance?

A. Yes, sir. I don't——

Q. (Interrupting.) And how long did they continue?

A. I think about a year; perhaps less than a year.

Q. Didn't they continue from the latter part of 1873 until the early part of 1875, middle of 1875?

A. I don't so remember it.

Q. You think about a year?

A. I think those suits were terminated in the following season.

Q. In 1874?

A. The property returned back; yes, sir.

Q. Didn't you write to Mr. Wood as late as the summer of 1875 that you thought Lawrence had been rearrested on the old warrant and discharged in the summer of 1875?

A. Mr. Lawrence wrote to me that he went to Detroit and was rearrested, with some understanding that he should be, by the heirs, and then discharged.

374 Q. That was in 1875?

A. I can't say what year it was.

Q. Mr. Lawrence had a good deal of litigation over that matter in the courts, did he not—the matter of that criminal proceeding?

A. He had considerable litigation in the courts in New York from November 9th, 1873, until February or March of the following season.

Q. Then Ward instituted a civil suit against you and Wood and Lawrence, growing out of the same transaction—same trade?

A. Yes, sir; civil suit against all three of us.

Q. That continued for two or three years, did it not?

A. I don't think—that is what I referred to as coming to a final conclusion along about a year after, and the property reverted back.

Q. Whatever time it lasted it was against all three of you?

A. Yes, sir.

Q. And grew out of the trade which had been made with Ward about which you testified?

A. Yes, sir; the attachment of the property which he had turned over to Mr. Lawrence—stock.

Q. Did you ever have any settlement with Mr. Lawrence about the expenses of that litigation?

A. No, sir.

Q. Did Mr. Wood ever have any settlement with Lawrence about the expenses of either of those litigations, that you know of?

A. I couldn't say.

Q. So far as you know?

A. No, sir.

Q. Have you any idea of the expenses incurred by Mr. Lawrence in that litigation, civil and criminal?

A. I have not.

Q. You never asked him how much he had been out?

A. No, sir.

375 Q. He never told you?

A. When he came back here he told his friends and told me that he had spent something like fifteen or twenty thousand dollars; it had cost him that.

Q. You never settled with him for your part of that?

A. No, sir.

Q. Nor neither did Wood, so far as you know?

A. He never made any demand on me for anything of that kind.

Q. During the year 1872, along about that time, you spent a good deal of time in imitating Joab Lawrence's handwriting and signature, did you not?

A. No, sir.

Q. Got a special pen, in order that you might the better imitate his signature, didn't you?

A. When I was in the office——

Q. (Interrupting.) Answer that question.

A. I don't know that I ever obtained a special pen.

Q. Didn't you get a peculiar pen—certain kind of pen—because with that you could more closely imitate his handwriting and signature?

A. I can't say that I did, but I might have——

Q. (Interrupting.) You can't say that you did; haven't you so stated within the past week, to a gentleman in this city?

A. I have an idea that I did buy a big pen, just the same as he used to write with, and it occurs to me now that I kept a pen on my desk—a large, heavy pen, very near as big—he always had a pen very near as big as that thumb nail, and I got one as near like it—as near as I remember; I have quite a distinct recollection that I did, and in order to carry a lot of ink in the writing——

Q. (Interrupting.) In order to imitate his handwriting?

376 A. No, sir; I could imitate anybody's handwriting if I like it.

Q. Didn't you get that pen so that with it you could write more like Joab Lawrence?

A. Yes, sir; I liked the man and I liked his handwriting.

Q. Didn't you get a pen so that you could more closely imitate his handwriting and signature?

A. I got a pen similar to his.

Q. For what purpose?

A. For the purpose of writing a heavier hand than I was then writing.

Q. For the purpose of enabling you to write more like Joab Lawrence; wasn't that what you got it for?

A. Maybe it was; I liked his bold handwriting.

Q. You liked his handwriting?

A. Yes, sir.

Q. Liked his signature, too, didn't you?

A. Yes, sir; and everybody else did.

Q. And you got so that you could write his signature so near like his that you couldn't tell it, didn't you?

A. Well, I could tell anything that I wrote from Mr. Lawrence's—always could.

Q. Didn't you get so that you could imitate his handwriting and signature so closely that you were unable to tell yours from his in many instances?

A. No; I don't believe I could; I don't believe I could write "Joab Lawrence" twice alike. My hand is a heavier hand, and I was a working man and it was impossible for me to keep a steady hand——

Q. (Interrupting.) Didn't you testify in New York that your writing was so like his at that time that it was difficult for you to tell them apart?

A. Yes; I think I did.

377 Q. It was true, wasn't it?

A. I don't think it was.

Q. Don't think it was true?

A. I don't think now that I would be unable to tell his writing from mine.

Q. Did you think it was true when you testified to that in New York?

A. The first—that was when the ledger book or some book of the company——

Q. (Interrupting.) I don't care what it was.

A. —was shown me, and first I says, "That looks very much like my figures as I make them now," and on first impression—I studied on that thing and said it was not.

Q. Didn't you testify that your handwriting was so similar to his it was very difficult to tell them apart?

A. Very likely I did.

A. There is quite a similarity between his handwriting and mine.

Q. (Showing witness Exhibit 1.) I ask you to look at this paper which I hand you and state if that is a letter written by Mr. Wood—W. H. Wood.

A. It is.

Q. Is that Mr. Wood's signature?

A. Yes, sir.

Mr. DICKSON: It has already been identified, dated April 3rd, 1888.

Q. I show you a letter under date of June 21st, 1888, and the

envelope accompanying it and ask you if the letter and signature thereto is that of W. H. Wood.

A. Yes, sir.

Q. Is the envelope addressed in the handwriting of W. H. Wood?

A. No, sir.

Q. Did you receive that letter from Mr. Wood in due course of mail?

A. Yes, sir.

Q. Do you know in whose handwriting the address on the envelope is?

A. It is Mr. Wood's book-keeper, I should take it to be—
378 somebody in his office; Mr. Wood is a very old man.

(Letter last shown witness marked Exhibit 15, envelope marked Exhibit 15 A, for identification.)

Q. I hand you a letter and envelope accompanying it, under date of March 1st, 1880, purporting to be a letter from Mr. W. H. Wood, and ask you if that letter is in his handwriting and signed by him.

A. Yes, sir.

Q. Is the envelope accompanying it in his handwriting?

A. I should take it to be.

(Letter last shown witnessmarked Exhibit 16 for identification; envelope marked Exhibit 16 A for identification.)

Q. I show you a letter under date of April 3d, 1888, purporting to be a letter addressed to you by Mr. W. H. Wood.

A. Yes, sir; written by Mr. Wood in pencil.

Q. It his handwriting?

A. Yes, sir.

(Said last-mentioned letter was marked Exhibit 17 for identification.)

Q. Here is a letter under date of June 4th, 1888, purporting to be a letter addressed by "W. H. W."—I suppose that is W. H. Wood—to you?

A. Yes, sir.

Q. Is that his handwriting?

A. Yes, sir.

Q. And those initials are in his handwriting?

A. Yes, sir.

Q. And the envelope that accompanies it; is that his?

A. No, sir; somebody in the office.

Q. You received that letter in due course of mail?

A. Yes, sir.

(Said last-mentioned letter was marked Exhibit 18 for identification; envelope marked Exhibit 18 A for identification.)

Q. I show you telegram under date of April 5, 1888, and
379 ask you if you received that, coming from W. H. Wood.

A. I did.

Mr. DICKSON: That is already identified.

Q. I show you a letter under date of December 22nd, 1874, and ask you if that is in your handwriting and signed by you.

A. Yes, sir.

Q. It is addressed to "Dear Lawrence." Who is intended by "Dear Lawrence"?

A. Captain Joab Lawrence.

(Said last-mentioned letter was marked Exhibit 19 for identification.)

Q. I show you a letter under date of January 3rd, 1875, and ask you if that is in your handwriting and signed by you.

A. Yes, sir.

Q. And the envelope accompanying it?

A. That is my handwriting.

Q. The "Dear Lawrence" there is Joab Lawrence?

A. Yes, sir; Captain Joab Lawrence.

(Said last-mentioned letter was marked Exhibit 20 for identification; envelope marked Exhibit 20 A for identification.)

Q. I call your attention to a letter annexed as an exhibit to the Wood deposition, under date of November 1st, 1875, purporting to be a letter from you to Mr. Wood. Examine it as carefully as you can.

A. That is my handwriting.

Q. Who is "Friend Wood"?

A. That is William H. Wood, San Francisco.

Q The party who was coplaintiff with you in the New York suit?

A. Yes, sir.

Q. I wish to read you the letter to which your attention has just been called, and then ask you a question. (Reads.) Did Mr.
380 Lawrence state to you, prior to the writing of that letter, that you informed Mr. Wood that he advanced that $20,000 himself?

A. I don't now remember; there must have been something said to call out such a letter.

Q. That there were overdrafts of the company, and that he put up his own checks, his own money, for the twenty thousand?

A. That is what we understood at the time it was put up.

Q. Did Mr. Lawrence state that, as you write to Mr. Wood?

A. I can't say; there must have been something of that nature or I wouldn't have wrote it.

Q. "That the first 23,587 he paid into the bank on his return from Europe to settle overdrafts up to that time, and at the conclusion of the Ward trade there was still further overdrafts, amounting to twenty thousand, for which he gave his own checks." If he made such a statement to you on or shortly before November 1st, 1875, what reply did you make to him—do you remember?

A. I disremember.

Q. Did you dispute it?

A. I can't say what I might have said at that time.

(Said last-mentioned letter, dated November 1st, 1875, addressed to Friend Wood, signed John N. Whitney, and annexed to the Wood deposition, marked Exhibit 22 for identification.)

Q. I ask you to look at a letter annexed to the Wood deposition under date of March 31st, 1875, addressed to W. H. Wood, and signed Whitney; is that your handwriting?

A. Yes, sir.

Q. Your signature?

A. Yes, sir.

(Said last-mentioned letter was marked Exhibit 23 for identification.)

381 Q. Letter also annexed to the Wood deposition, dated Salt Lake City, March 13, 1875, addressed to W. H. Wood, Esq., and signed John N. Whitney; is that your handwriting and signature?

A. Yes, sir.

(Said last-mentioned letter was marked Exhibit 21 for identification.)

Q. Look at a letter annexed to the deposition, dated Evanston, Wyoming, October 3rd, 1887, addressed to W. H. Hood, Esq., and signed J. N. Whitney; is that your handwriting and signature?

A. Yes, sir.

(Said last-mentioned letter was marked Exhibit 24 for identification.)

Mr. BROWN: If you simply want to identify those letters to read hereafter, we will not deny the signature to any of those.

Mr. DICKSON: There are some of Wood's.

Mr. BROWN: Or those that purport to be Wood's.

Mr. DICKSON: All right; let the record show that.

Mr. MARSHALL: That includes all letters attached to Wood's deposition?

Mr. BROWN: Yes; all those that we have seen, that are resonably their handwriting, we will admit, anyway; if there is anything hereafter that should arise that is doubtful and you should want to prove it, we will give you a chance to prove it; but all these here we will admit.

Q. (Showing witness paper.) Here is one dated West Millbury, July 18, 1876, addressed to Friend Whitney, signed William H. Wood; is that Mr. Wood's handwriting?

A. Yes, sir.

382 Q. You received the letter?

A. Yes, sir.

(Said last-mentioned letter was marked Exhibit 25 for identification.)

Mr. DICKSON: Mr. Brown, does your statement that you do not object to the handwriting of any of the letters annexed to the Wood

deposition apply to the letters of Alexander & Green addressed to Mr. Wood?

Mr. BROWN: Why, of course, so far as the mere proving of the signatures is concerned.

Mr. DICKSON: So far as they may be competent——

Mr. BROWN: You need not stop to fool away time proving signatures that we know are all right.

Mr. DICKSON: Now, if your honor please, there is one other question we would like to have a ruling on, and that is the matter before the court awhile ago as to our right, as part of the cross-examination of Mr. Whitney, to go into the demand that he claims to have made upon Mr. Lawrence upon the 6th day of April, 1888. I call attention to the fact that Mr. Whitney's deposition has been admitted so far in evidence in which he testifies to that demand and what the conversation was; in fact, he does that in both of his depositions, the one taken in New York and again in the one taken in Salt Lake City. We have taken depositions, which we will offer when we come to our side of the case, of the physician and nurse who were in attendance upon Mr. Lawrence at that time for the purpose of showing that the man was not in condition at that time to have held any such conversation; that it was utterly impossible.

383 Should these depositions at the close of the case be ruled out the materiality of our New York depositions would not be apparent in the appellate court. At the same time it is very important testimony, it seems to me, for your honor, as it would be for a jury, if the case were being tried before a jury, to have before them, inasmuch as it reflects directly upon the credibility of this witness, that testimony; and we urge and will take a ruling on it now that we have the right, this man having testified that Lawrence through all these years was his trustee, to ask him any question the answer to which would tend to show that their direct testimony was not true; and we claim that if it should appear that during all the years—fifteen or sixteen or seventeen or eighteen years—he made no demand upon Mr. Lawrence at all for any accounting or settlement that it would tend directly to disprove his testimony and the existence of any trust at all; that if we have the right to ask him as a part of the cross-examination if any such demand was made we have a right for the same reason to ask him what the demand was, when it was made, where it was made, and the circumstances of the demand as part of the cross-examination, and we do not thereby make him our witness so that we will be precluded from rebutting his testimony or disproving it.

The COURT: As I understand, when the New York deposition and Salt Lake deposition of this witness were taken he was cross-examined then as to all the matters that he was examined in chief upon. Now he is called by the plaintiff as a witness to testify orally, and everything that is cross-examination of his testimony now on the stand, of course, is proper. As I stated before, a very

384 liberal rule should be allowed in the cross-examination of a witness in such a case as that where the other party is dead. Now, anything that is strictly proper in the cross-

examination of his testimony as given here, why, of course, does not make him you- own witness, and you waive no right by it; but as soon as you go outside of what is the cross-examination, as tested by the liberal rule, and ask him concerning other matters than about which he testified in chief I don't see why that would make him your witness.

Mr. DICKSON: We want a ruling on that.

The COURT: Now, of course, I can hardly carry in my mind just all he testified about.

Mr. DICKSON: He has not testified while here in direct examination about the demand made in New York on April 6th, 1888.

The COURT: You claim that you have a right to cross-examine him as to that, because he testified in giving his deposition about it.

Mr. DICKSON: No; independently of the deposition altogether, he having testified that the relation of trustee and *cestui que trust.* existed through all these years as between him and Lawrence. He did testify to that here; that we have a right to cross-examination, to ask him any question the answer to which might tend to disprove that testimony of his or to discredit it, and we claim that if it were true that during all these years he never made any demand, it would tend to discredit his testimony that there was any trust existing, because it would not be natural, and for the same reason, if he should answer that there was a demand made, we have a right to ask him what that demand was, when and where made,
385 and all the circumstances attending it, for the purpose of disproving it and as a part of the cross-examination. I state we do not want to make him our own witness and do not intend doing so. We ask the right, and ask a ruling on it, to cross-examine him on that.

The COURT: Do you claim that he has testified here that the decedent was a trustee holding property of his during all those years, and that he made a demand?

Mr. DICKSON: We claim that he testified here; yes; that the decedent was a trustee of his all these years, since 1872.

Mr. JUDD: He don't claim, though, that he ever testified he made any demand of him in New York or ever had any conversation there about it with him.

Mr. DICKSON: No.

Mr. BENNETT: But he introduced the declaration of trust.

Mr. BROWN: It seems to me, may it please your honor, there is nothing before this court. My brother is proceeding with a question of the scopeof cross-examination, and, while we don't object to it, we gave him notice that we should treat it hereafter in a certain way. Now, he says that he has no doubt it is proper cross-examination, if I understand it. He urges with a great deal of earnestness that it is proper. If he thinks so, nobody stands in the way. All he has got to do is to go right ahead. If he really believes it; if he has the good faith in what he says to be true, why don't he proceed? Nobody is questioning him; but he goes further. He says he wants a ruling now—that is, to ask your honor to assist

him in his judgment in this case. It is asking your honor
386 to step in and try the case and tell him what you think you will rule some other time when the case comes before you. We object to any such performance as that. It is time enough for the court to rule when there is an objection made. What would it be a ruling on? My brother says he wants you to go into his confidence, or take him into your confidence, and join with him and tell him what you will rule some other time. It seems to me it is not a proper request.

The COURT: Well, I cannot remember all that this witness has testified to to make a ruling on general principles, so to speak. Now, when it would come up later on in the case and it would be insisted that it was not proper cross-examination and you had weighed the competency of the witness and asked him on cross-examination about things that he had not testified about on direct examination, why I think that is not strictly or properly cross-examination of this witness upon the testimony as given now upon the stand here about transactions between him and Lawrence during the lifetime of Lawrence, would not be proper as cross-examination, and I think the competency of the witness as to those things would be waived.

Whether it would be cross-examination, you must take your chances on it. Of course it is dangerous ground, and you will waive anything of that sort.

Mr. DICKSON: Well, we will not press it. I ask to have the record show, if there be no objection, so that there may be no misunderstanding, that at the close of the direct examination of the witness we moved to strike out all that portion of his testimony
that was objected to, all matter to which he undertook to
387 testify as to things that were equally within his knowledge and Lawrence's.

Mr. JUDD: You did that before you commenced your cross-examination.

Mr. DICKSON: I don't think I did, and that is the reason I want it now.

Mr. BROWN: That is all right.

Redirect examination by Mr. BROWN:

Q. This letter which was handed to Mr. Dickson and handed back by him, I want to enquire whether that is the handwriting of W. H. Wood.

A. Yes, sir.

Q. A letter received by you?

A. Yes, sir.

Q. Is it one of the same series of correspondence with the others which you identified on cross-examination?

A. Yes, sir.

Q. I mean by series not the same letter, but one of the lot.

Said letter was marked Exhibit A L for identification.

Q. You were asked as to a stock list or transcript from the ledger which you testified to in New York. Had you recently seen the stock ledger itself before testifying in New York?

A. No, sir.

Q. How long before you testified in New York had you seen this book?

A. It was in 1875 that I saw the stock ledger.

Q. Had you compared that list with that book?

A. No, sir.

Q. How did you come to think that that was a list of the stockholders?

A. By the various entries, knowing the parties so well. It went on to state that Mr. Crismon—the various Crismons—had so many shares, and the Fondulac Company had so many shares, and I
388 took it for granted that that was a correct list of the stock ledger, but when my attention was called in New York by the attorneys for Lawrence that it didn't foot up 5,000 shares I couldn't account for it.

Q. Of course, when it didn't foot up five thousand, you saw it was not complete?

A. Yes, sir.

Q. State whether, when you saw that stock ledger and during the time that you supposed it was the full list—whether you were led to believe that that was the statement as it was made at that time of the true list.

A. I believed it was a true list from this document I had?

Q. Yes.

A. I did until my attention was called to it by the attorneys on the other side.

Q. And were you misled by that with regard to your own two hundred and fifty——

A. Yes, sir.

Q. Or three hundred and five shares?

A. Yes, sir; I saw that I wasn't down only for two hundred and fifty, and I was satisfied that was incorrect.

Q. How did you get the 305 shares?

A. I got them in return for the mining property that I conveyed to the Eureka Mining Company of Utah.

Q. Repeat again how you got that 305.

A. For the mining property that I put in the bond and consolidated with the other owners of the properties that was bonded to me and Mr. Richards, and bonded my property to myself and Mr. Richards.

Q. You were really grantor as well as grantee?

A. Yes, sir; the price being named on each person's property, and mine was put in at $30,000. I paid in cash $30,000 for
389 the property, and added $500 for attorneys' fees and expenses pertaining thereto.

The COURT: That 305 shares, as I understand you, was not stock that you subscribed, but it was stock given to you in consideration of property you traded to the company.

Mr. BROWN: Yes, sir; and the 250 I understood him to testify before was his bonus in the margin.

Q. One represented your interest in the Left Bower?

A. Yes, sir.

Q. Did you get one-eighth of the Silver Eyelet and Wyandotte Mill stock which Lawrence got from Ward?

A. Yes, sir.

Q. I see I have this memorandum: "Was it true that Lawrence said that he passed the check to include the salaries?" Is that one of the objects which he stated to you?

A. Why, the check was passed by Mr. Wood and myself in the office before his return, and we went on using the next following checks in transactions.

Q. I was speaking as to what Lawrence said he did it for after his return. Was it true that he said he passed the check to include the salaries?

A. Yes, sir.

Q. Counsel asked you on cross-examination if you, after learning of these large dividends from Packard, in the winter of 1885–'6, went to Lawrence. I ask you if you did anything else or took any other action or step.

A. I enquired for Mr. Lawrence, as near as I now remember, and went to Mr. Sutherland at the same time.

Q. Took legal counsel?

A. And he——

Q. (Interrupting.) I don't care particularly for what he
390 said or did, but whether you went to him with a view to hiring him—prosecuting it -or you.

A. Yes, sir; had no idea of prosecuting Mr. Lawrence on this claim.

Q. Well, talked to him as a lawyer?

A. Yes, sir.

Q. What Sutherland was that, Jabez?

A. J. G. Sutherland.

Q. You were asked something about Mr. Fox on the cross-examination. He was mentioned as the son-in-law of Mr. Lawrence. Is he the son-in-law of Mr. Lawrence?

A. Yes, sir; I understand him to be.

Q. Or did he marry his wife's daughter?

A. He married his wife's daughter.

Q. The daughter no relation to Mr. Lawrence?

A. She wasn't Mr. Lawrence's child, as I understand it.

Q. Counsel asked you as to whether you had settled with Lawrence the expenses of the litigation which Lawrence incurred with War-, civil and criminal. Did you yourself incur expense also?

A. Yes, sir.

Q. And other expenses did you incur?

A. Yes, sir.

Q. Has he ever settled with you?

A. No, sir.

Q. In your cross-examination you spoke two or three time- of Lawrence raising the whole $100,000 to be put upon the bond. I want to ask you whether you meant by that that he raised the whole in cash at that time or only, as you afterwards explained, the fifty thousand.

A. At the time of the organization?

Q. Yes.

A. There was a fifty-thousand-dollar draft on Weston and Keene, of Chicago, given by Mr. Lawrence, and there was three notes that has been referred to here, two for fifteen thousand and one for
391 twenty, deposited to make up the hundred thousand dollars, and carried it by the banks and entered up as cash and credited towards the company.

Q. Counsel asked you as to the expenses incurred by Lawrence in this civil and criminal litigation. I want to ask you whether the knowledge of that had anything to do with your not demanding money from him on the sale of the mill.

A. He had spent considerably more money that I had in that litigation with Ward, and I felt rather grateful towards Mr. Lawrence, and I never should have asked him for anything of that mill receipts if it hadn't amounted to anything more than five or six thousand dollars; neither would I have asked him for that dollar dividend, because I wanted to see him reimbursed. That was my feeling towards the man. He had spent lots more money than I had in the litigation.

Mr. DICKSON: Lots more?

A. Yes, sir. How much he had spent I don't know.

Mr. BROWN: You have mentioned in your cross-examination of being out of the Territory more or less. When did you go to Wyoming?

A. 1882. I was there in the summer of 1879; from 1879 on.

Q. That is when your interest first started there, was it?

A. Yes, sir; in 1879.

Q. Now, I want you to explain fully to the court about how much of the time you have spent in Wyoming and how often you have visited Salt Lake.

A. From 1879 to 1882 I was here in the winter season, boarded at the hotel, and buying cattle and driving cattle and delivering them on contracts to parties who were entering in that busi-
392 ness in Wyoming up to the year 1882 or '3, and then I engaged with Mr. Chambers—R. C. Chambers—in this town, and we started a herd of our own, and I engaged in that herding.

Q. That is in 1882 and '3?

A. Yes, sir; and I have remained there all the time, winter and summer, since.

Q. You occasionally make trips down here; how often do you drop down here?

A. I have been here this year since the first of January; perhaps, three times—three or four times.

Q. Would that be a fair average of the years gone by?

A. Be here three or four days and go back—sometimes one day, sometimes two days.

Q. I repeat my question, whether that would be a fair average of the years from the time you and Chambers went into the herding business?

A. Yes, sir; since 1883—1883 and '4—I think it is 1883 we engaged together.

Q. Your business has been taking charge of that herd, I suppose?

A. Yes, sir.

Q. When did you first come to Utah?

A. I came to Utah in April 9—21st day of March, 1871.

Q. Just a month or so before the time that you got Mr. Lawrence to come here?

A. It was the 19th or 20th of March that Mr. Lawrence and I arrived here.

Q. Where had you been living before that?

A. I had been living in the city of Chicago.

Q. How long?

A. I was in the business there for fifteen years; since 1859.

Q. What business were you in there?

A. Manufacturing boots and shoes.

393 Q. And before that where did you come from?

A. I was in Minnesota from 1856.

Q. To 1859?

A. Yes, sir.

Q. And before 1856?

A. I came from Millbury, Massachusetts.

Q. And born and raised there in Massachusetts?

A. I was born and raised in Princeton, Massachusetts, twenty-five miles from where Mr. Wood lived, that I lived at the time before going to Chicago.

Q. What address in Chicago did you do business at?

A. 32 Lake street.

Q. You said in the cross-examination that Mr. Wood was a very old man?

A. I should judge him to be seventy-five years old, if not older.

Mr. DICKSON: We object as immaterial how old he is.

Mr. BROWN: We think it is proper.

The COURT: It is not improper, I think. I think he has a right to the testimony as to his age.

Q. Do you know how long Mr. Wood had been in the country, West?

A. Mr. Wood engaged in the California trade when I was living at his father's place in Millbury, Massachusetts. That was in 1850.

Q. Did he come West, then, in 1850?

A. Well, he staid there for three years, while I lived at his father's place, and then went to California, and remained in California ever since, except to go home and visit the folks.

Q. Mr. Judd asks me how old a man you are?
A. I am 52 years old.
394 Q. In managing and developing the property and taking charge and doing work down there, did you do it under the direction of anybody?
A. I done it under the direction of Joab Lawrence.
Q. And as to whatever you did up here, whether he directed you or not?
A. About the office?
Q. Yes.
A. All the meetings and resolutions and acts of the company was all done under his dictation and direction.

Thereupon court took a recess until 2 o'clock p. m.

JOHN N. WHITNEY being recalled, the direct examination was resumed by Mr. Judd as follows:

Q. Do you know anything about that bond that was given to you and Richards by these owners of the mine?
A. It was taken possession of by Mr. Lawrence and was kept in the Eureka office, there, with the company's papers and books.
Q. When did you see it last?
A. I don't think I saw it—a few days after we got located there. in the office.
Q. It is not in your possession?
A. No, sir; and has not been——
Q. Nor has not been since you turned it over to the archives of the company?
A. No, sir.

395 Recross-examination by Mr. DICKSON:

Q. Have you made any search for the bond?
A. No, sir.
Q. None whatever?
A. I haven't had possession of it.
Q. Have you ever made any search for it?
A. No, sir.
Q. Nor inquiry about it?
A. No, sir.
Q. You stated to Mr. Brown this morning that the reason why you didn't ask Mr. Lawrence in 1877 for any portion of the proceeds of the sale of the mill was because he had been to a good deal more expense than you had in the Ward litigation?
A. Yes, sir; that was my view of it at the time; that was in my mind.
Q. Why didn't you give that reason when I asked you on Saturday why you didn't make a demand?
A. I don't remember why I didn't.
Q. Do you remember the reason that you gave on Saturday for not asking him how much he realized on the sale of the mill?

A. I don't know that I do.

Q. Didn't you say then that it was because Lawrence kept saying to you all the time that the mine was sometimes a little ahead and sometimes away behind?

A. I don't know. He used to say that.

Q. Didn't you on Saturday give that as a reason why you did not ask him how much he realized on the sale of the mill machinery?

A. I may have done so.

Q. Didn't you do it?

A. I don't remember.

Q. And when I called your attention to the fact that that could hardly be true, as he sold the mill and informed you of it a
396 few days after he effected a compromise, didn't you then say that you couldn't tell why you didn't ask him?

A. I don't remember.

Q. Don't remember what you said to me last Saturday about it?

A. I don't remember exactly what my answer was to your question.

Q. You spent your winters here until 1882 or '3, I understand you?

A. Yes, sir; I think I did.

Q. And then after you went in with Chambers; from that time on you have been here two or three or four times a year, a few days at a time?

A. I might have been here six times a year, short stays.

Q. For a few days at a time?

A. Yes, sir.

Q. Did you have correspondence with Mr. Lawrence after 1876?

A. I don't think I did.

Q. No letters passed between you after that time?

A. I don't remember.

Q. After he had effected a compromise of the foreclosure suit did you ever have any correspondence with him?

A. I think I did.

Q. About these matters?

A. No, sir.

Q. I mean about any matters involved in this suit?

A. No, sir.

Redirect examination by Mr. BROWN:

Q. When you were on the stand before I asked you as to the handwriting of one of these letters of September 27th; I couldn't find the other, and I can't tell by the marking which one it was, so I will ask you as to both of them again.

A. They are both in the hand of Joab Lawrence.

397 (Said letters were marked respectively Exhibits S and Ac.)

Mr. JUDD: We will rest the Whitney case at this point.

Mr. DICKSON: Mr. Whitney, take the stand; there is a question I omitted and desire to ask before we take up the case.

Recross-examination of JOHN N. WHITNEY by Mr. DICKSON:

Q. You stated in answer to Mr. Brown what Lawrence had said to you concerning the expense he had been to in that Ward litigation. Didn't he tell you it had cost him in the neighborhood of sixty thousand dollars?

A. No, sir.

Q. What did he say?

A. Fifteen or twenty, as I understood him.

Q. When did he tell you that, or are you sure he ever told you?

A. He told me that when I was in Canada, when he came to see me in Canada in March.

Q. The litigation wasn't over then by any means?

A. No, sir.

Q. After it was over what did he tell you it had cost him?

A. He told me fifteen or twenty thousand dollars.

Q. After it was over?

A. Yes; or after I returned here in August, 1874.

Q. Did you pay any of the expense in employing lawyers?

A. In Detroit?

Q. In Detroit or New York.

A. Yes, sir.

Q. Who?

A. I paid Mr. Romeyn some.

Q. How much?

A. I couldn't say how much.

Q. About how much?

A. I couldn't say.

Q. Have you no idea now?

A. I have none now; no, sir.

Q. None in the world?

A. No, sir.

398 Q. How is it your memory is so good about some things pertaining to this matter and blank as to other things?

A. I can't account for that.

Q. Can you say whether you paid him fifty dollars?

A. I paid him something, if I remember rightly, when he was over in Canada.

Q. Ten, fifteen, or twenty or fifty dollars—what?

A. Oh, two or three hundred, perhaps.

Q. That is all you ever paid him, is it?

A. Yes, sir; that is as near as my memory serves me.

Plaintiff rests.

399 The following unsigned declarations are the declarations referred to in John N. Whitney's testimony as written by him and sent to Lawrence, marked respectively Exhibits 10 & 9 for identification and Exhibits A 4 & A 3 of Whitney's New York deposition:

SALT LAKE CITY, *Nov. 9th*, 1872.

John N. Whitney:

This is to certify that you or your assigns or legal representatives are entitled to and own, as your own property, an undivided interest, amounting to $3,125.00 of the amount *of* which the Eureka Mining Co. of Utah are indebted to me, which indebtedness is acknowledged in said compan*ie*'s note of $43,587.50, bearing date Salt Lake City, Sept. 15th, 1872, and drawing interest at the rate of 20% per cent. per annum, payable six months after date to Theodore F. Tracy, as trustee, which note is secured by mortgage on the entire property of the Eureka Mining Company of Utah, and sanctioned by resolution of the board of trustees.

SALT LAKE CITY, *Nov. 9th*, 1872.

John N. Whitney:

This is to certify that you or your assigns or legal representatives are entitled to ⅛ interest in the real estate known as the Mansion House property, situate in the city of Detroit, State of Michigan, acquired by me of Eber B. Ward October 7th, 1872, which real estate is deeded to me and recorded in my name in the register's office of Wayne county, State of Michigan.

400 EXHIBIT 100.

(Ex. A M, Whitney *vs.* Fox.)

Supreme Court, City and County of New York.

JOHN N. WHITNEY and WILLIAM H. WOOD
against
JOAB LAWRENCE.

The following affidavits of Sarah M. Lawrence *was* read upon the hearing of this case by the plaintiff as testimony in the cause and made Exhibits Nos. 100 and 101 respectively.

CITY AND COUNTY OF NEW YORK, *ss:*

Sarah M. Lawrence, being duly sworn, says:

I am the wife of Joab Lawrence, the above-named defendant. Our home is at Salt Lake City, Utah, where we have resided for about 15 years. Mr. Lawrence has lived there still longer. For the past two years we have spent a portion of the time there,
401 about six months, and the remainder of the time in Europe and New York city. We are temporarily sojourning here in New York to have the medical attendance of Dr. Edward C. Seguin for the defendant, who is too ill to attend to business. His brain is affected and his speech is impaired. He has trouble about the heart, so that the least excitement throws him into fits of weeping and screaming. Dr. Seguin has forbidden all intercourse with him on matters of business, on the ground that he is unable to under-

stand them, and is certain to be injured physically and mentally by them any exciteme-t liable to result fatally. During his illness, various persons have attempted to communicate with him on business matters, but always with injurious results. The doctor therefore forbade it.

On the 6th day of April, 1888, the plaintiff Whitney called at the house, 150 West 59th street, and talked in a friendly way for about fifteen minutes, when our lunch bell rang and he was invited out to lunch. Mr. Whitney said, "No, I guess not. I have only called to have a business talk with the Captain," meaning defendant. I said, "Oh, well, come and have lunch, and we will talk about that afterwards." He went out to lunch and afterwards returned to the library. The defendant then left the room with his nurse, who takes charge of him. After he had gone, I said, "Mr. Whit-
402 ney, I cannot permit you to have any business talk with the Captain. You can see that he is in no condition for that. His physician strictly forbids his talking business of any nature whatever." Whitney then said, "But I must make my demands. I own an eighth interest in the Eureka Mining Company; I must have an account." I said, "I am sure that you have no business relations with the Captain." I said this because I had become familiar with the defendant's business matter- from his communications to me about his affairs before his illness and my attention to them afterwards. The defendant returned to the room where we were, whereupon Whitney said, "Captain, I would like to talk over a business"—— I allowed him to go only so far, when I addressed myself to my husband, "My dear, I have just informed Mr. Whitney that you are not allowed to talk any business with any one, that your physician strictly forbids it." Defendant then said, "John, if you have any business with me, you must wait until I get back to Salt Lake, where I will give you all the time you want to talk with me." Fearing that Mr. Whitney did not understand defendant on account of the impediment in his speech, for he could hardly be understood by any one not familiar with his speech, I repeated the above remark word for word to Mr. Whitney. Mr. Whitney then asked — to step to the parlor, which I did, leaving the de-
403 *de*fendant in the library (where) he had been. Whitney then said, "Will you please allow me five minutes conversation with the Captain?" I answered, "Most positively I will not." He then said, "Now, I appeal to you to help me in this matter, for there is a heap of money coming to me. I feel sure that neither the Captain nor you would do me out of a dollar that is coming to me." I said, "I assure you we would not. If you have any just claims wait until the Captain is well and they will be adjusted, I am positive." To which he answered, "But I can't wait. I must make my demands before it is too late." I said, "I cannot permit you to make any business talks to the Captain." Whitney said, "I ask you again, I appeal to you in a friendly way to help me. I am willing if the Captain will settle with me to take a great deal less than there is coming to me, and if he settles with me we can leave Wood (the other plaintiff) out." I said, "There is no use of making

any further talk with me for you are talking about a matter that I know nothing about." Mr. Whitney said, "Well, if I am not permitted to talk with the Captain I shall commence suit against him, and then he will have both of us to pay, Wood and I." I said, "The only thing that I can say in this matter is, I positively refuse to allow you to make any talk with the Captain of a business nature." I then left the parlor. Whitney returned to the parlor, and sat down for a second, and then rose and said, "I must go for I want to
404 leave on the six o'clock train for Boston." The Captain said to Whitney, "John, come in and see us again." Whitney stepped up to the defendant and said, "I must make a demand on you for an accounting in the Eureka Hill Mining Company. You know you have only been acting as trustee in trust for me." I stepped in between them, and said to Whitney, "I forbid you to say another word. Leave the room." Which he started to do. When he stepped half way to the door, and taking a letter from his pocket, he stepped up to the defendant and said, "As I am not permitted to talk to you, I will leave this letter for you to read," and handed him a letter, and then stepped into the hall. His conversation and attitude so frightened the defendant that he began to scream and cry and was greatly excited. Whitney seemed frightened at this, and while putting on his overcoat said, "Does he have these spells often? Does your physician give you any hope?" I made him no reply, and he passed out.

This is a full statement of the conversation had on that day. I deny most emphatically that the defendant at any time admitted anything to Mr. Whitney in relation to the matter in question. I have quoted all the remarks made by the defendant at that interview. I am satisfied that the defendant did not understand the purport of Mr. Whitney's remarks or his demand. From the remark
405 that if Mr. Whitney wanted to talk with him on matters of business, he should have to wait till he, the defendant, returned to Salt Lake City, and he would give him all the time he wanted. I am satisfied the defendant supposed that Whitney had some new project, in which he wanted him to join. I am also satisfied that such is the fact, because the next day (April 7th) the defendant asked me what Whitney had said when he was there the day before. I told what he had said, and that Whitney claimed a portion of the stock of the Eureka Mining Company; when he replied that he did not owe Whitney a dollar, and said that the business between them had been settled years ago. He said that Whitney had nothing to do with the stock.

If the plaintiffs had any just claim upon the defendant, they might have brought an action against him at any time since 1872, and could have collected any judgment which the claims set up in the complaint could warrant. The defendant has at all times been able, and still is, to respond to any such claim. The plaintiff Whitney has lived at Salt Lake City since 1871, and could have recovered any proper claim against the defendant there. The stock referred to in the complaint is and at all times has been at Salt Lake City, where the company was organized, and still exists. The defendant

has no business in the city of New York. He is simply here for medical attendance.

406 I deny that on the 6th day of April, 1888, at the interview above referred to, the defendant herein admitted the existence of the trust relations described in the plaintiff's papers, or that *that* the plaintiffs were entitled to an account. The defendant did not admit any liability, or refuse to make an account, but said nothing about it. Whether the plaintiff has or has not seen the defendant, I cannot say, at other times than April 6th, elsewhere than in New York, but he might have done so if he had chosen. I deny that on the 6th day of April, 1888, the defendant made deceitful and evasive answers to said Whitney, nor any answers, except as above set forth. Nor did he try to persuade Whitney to delay obtaining his rights. He said nothing about it, except as I have stated. He did not say that if plaintiff would wait till the parties should meet at Salt Lake City "something might be done." Defendant did not pretend that such meeting could not be held within six months. He said nothing about it.

I deny that the defendant expects to go to Europe. If he did, it would be simply with a view to his health and for a few months only. But we do not expect to go.

SARAH M. LAWRENCE.

Sworn to before me this 9th day of May, 1888.

WILLIAM C. DAVIS,
Notary Public, New York Co.

407 Exhibits were also introduced in evidence, the letters purporting to be written by Lawrence to Whitney, and by Whitney to Lawrence, and by Wood to Whitney, and by Whitney to Wood, and by Lawrence to Wood, and Wood to Lawrence, which were proven to be in the handwriting of those persons respectively, as signed by them; also a very large, numerous correspondence not annexed hereto, consisting of almost weekly letters from the different parties prior to and down to Dec., 1875, and all having more or less bearing upon the said question and making reference to the case involved.

The letters hereto annexed are only a small part of the correspondence between the parties, letters being introduced from the said Joab Lawrence to the said Whitney, and proven to be in the handwriting of the said Lawrence, written almost every week for years from 1872 to Dec., 1875:

408 EXHIBIT I.

(Ex. L No. 12, Whit. dep.)

SALT LAKE CITY, *March* 4, 1875.

DEAR LAWRENCE: I was with Geo. A. Whitney last night up till 12 o'clock, when Eureka was well talked up. He told me he went to Detroit to try and convince Ward of the value, etc., and vital im-

portance of redeeming or paying W. F. & Co., before the six months expired. He went to Meadaugh & D. office, convinced them of its true value, who told him Ward was stubborn, etc. But they were fully aware that Ward would make more and save more by trying to get it out of the property than attempting to fight us. You will find M. & D. favorably impressed. Whitney met Ward in their office two days before his death (rebellious) who told him he would not put up one cent, remarking, "You are all a set of robbers
409 and thieves out there," which ended the business. Whitney says the stock is not worth one cent. That W. F. & Co. had taken deed, which is false, and afterwards so acknowledged, but said he could see no way to save the property by an assessment, etc. He said the management was Whitney & B. and Packard, who, without $1 had made the property produce gross over $40,000. That W. F. & Co. had been paid about $15,000 leaving $25,000 to pay, which would take some time, etc., to pay, and they would not delay taking deed. Wanted me to suggest some plan to save I and Lawrence. Better take one or two leases, guaranteeing debts, etc. He said he could beat the mortgage, etc. I told him he couldn't beat one side of it; that you had advanced that amount, and would recover in equity. That since he was attorney, he had received $250 for services. That no great fight could be expected by attorneys with no prospect of paying. I remarked this. I think he tells W. F. & Co. he can beat the mortgage, who may put up the fight in case the clamor for the title, etc. Whitney told me the Jenny Lind case was decided in favor of the company at Provo last term. Some people say for the $40,000 taken out of the mine, it will take the like amount to put mine in shape to be judiciously worked hereafter. I write as information in case you talk trade. Whitney asked why we did not bring about a settlement. I remarked
410 we had no settlement we cared to make. That we gave the matter little thought. We did not care for any of the investigators, etc. That they had better let us severely alone.

He said Packard had no ill feelings towards me, but that they wanted this, me to make fight against Lawrence, etc. I told him we had no forgiving spirit towards any of the damned treacherous pups so long as we were blessed with life and health, and were within reach of any of them. That we should be their enemies, ready to do them all the injury possible.

This letter was written by pl'ff, John N. Whitney, and was introduced in evidence.

EXHIBIT 3.

(Ex A. 4 to Whitney's deposition.)

SALT LAKE CITY, *Nov. 9th*, 1872.

John N. Whitney:

This is to certify that you or your assigns or legal representatives are entitled to and own, as your property, an undivided interest, amounting to $3,125.00 of the amount which the Eureka Mining

Company of Utah are indebted to me, which indebtedness is acknowledged in said company's note of $43,587.50, bearing
411 date, Salt Lake City, September 15th, 1872, and drawing interest at the rate of 20 per cent. per annum, payable six months after date to Theodore F. Tracy, as trustee, which note is secured by mortgage on the entire property of the Eureka Mining Company of Utah, and sanctioned by resolution of the board of trustees.

(Ex. 10 for *id.*)

(Ex. A 3, Whitney's dep'n.)

SALT LAKE CITY, *Nov. 9th*, 1872.

John N. Whitney:

This is to certify that you, or your assigns or legal representatives, are entitled to one-eighth interest in the real estate known as the Mansion House property, situate in the city of Detroit, State of Michigan, acquired by me of Eber B. Ward, October 7, 1872, which real estate is deeded to me and recorded in my name in the registrar's office of Wayne county, State of Michigan.

(Ex. 9 for *id.*)

(The originals of above on separate sheets were admitted to be in handwriting of plaintiff and found in papers of Joab Lawrence after his death and are referred to in Whitney's evidence.)

412 EXHIBIT 4.

(Ex. 11 for *id.*)

SALT LAKE CITY, *February* 21, 1875.

DEAR LAWRENCE: Yours dated New York, 14th, is just received, in which you request me to give my opinion regarding the value of Eureka property. I have written you several letters since your leaving Salt Lake in September last, stating what was being done at the company's mines, and the results from the workings thereof. And I have now no information to cause me to change my views regarding the property. As I wrote you recently, that I had sent a practical miner to examine the property, and to report to me the facts in regard to the development being made, the amount and quality of ore being extracted from the mines, on Eureka hill, what was being done with the same, how many men employed, and his opinion as to the future for a valuable mine. He was familiar with the property and all its workings in 1871 and 1872, and expresses himself in this manner: That 45 men are employed "in the form of lease, receiving one-half the ore," taking out nearly all the distance from the Beck shaft to south end of the property, "1,500 feet in length," and that the men frequently open out very rich bodies of ore. I have lately learned of a rich development

being made near the south end, the ore going $3,000
413 per ton. The men, he reports, are making good wages, and well pleased with their arrangement with the company. That they work very leisurely, say 7 hours per day. That if they will work harder, putting in full time, they could do much better. That the ore is being assorted as taken out, "leaving on the hill what they think does not carry $50 in silver per ton," and sold to the mills in the district. That the mines are looking well, "much better than he expected to find them," and if worked with proper management, would produce as good results as any mine he had seen. I have also consulted the superintendent of the Wyoming mill regarding the quality and working of the ores, who tell- me there is no discount as to the quality, "some of which runs very high." That if the company would only keep him supplied with what the mill could work, he would be quite satisfied. Under Packard's rule, he would give this mill, say two weeks' supply, then change to other mills. This mill is now being supplied with all the ore it can work from the Eureka mines. It is pretty generally conceded by all here that it is the best property "producing milling ores" in this Territory. The property is of greater value than in 1872 and 1873, when people considered it worth $2,000,000 to $3,000,000. From what information I am able to gain about the property, it would be a bargain if the property could be se-
414 cured for, say $500,000, outside the mortgage and Wells, Fargo & Co.'s claim. On this basis good dividends might be expected to be realized regularly. You know what I consider good returns from any mining venture. Not less than 2½ per cent. per month, with all the risks and chances entailed. It is to be regretted that the property has not been under the management of some practical mining man. When stockholders might be expected to have received some benefits therefrom. We have had mild and pleasant weather here all winter, with very little snow.

Yours, etc., JOHN N. WHITNEY.

EXHIBIT 5.

(Ex. 12 for *id.*)

(Ex. Y No. 25, Whitney's deposition.)

SALT LAKE CITY, *June 25th*, 1875.

DEAR LAWRENCE: I received telegram from Romeyn today enquiring your address, and asking if I will sell one hundred shares Silver Islet. I replied Fair Haven, N. J., and $25 per share. I also telegraphed you to Hoffman house to forward, having learned you had gone to Yankton, Dakota. Bronson was here on the 17th,
having been sent out by executors. He could ascertain but
415 little information from Wordsworth or B. & Whitney, who it looks like, were and have been in league with Wells, Fargo & Co. to secure the mine. Wadsworth tendered the officers or attorneys a deed for the property as per agreement made six months

prior, extending the time to liquidate debt, and pay 1½ per cent. per month. They have been paid $22,000. Their claim the 17th was $28,000. Wadsworth told Bates & Bronson he could not now see why he could surrender after the 17th. Property that paid $50,000 last year being 10 per cent. on $500,000 which he considered it worth.

Bates then dictated a dispatch Bronson sent "Close trade with Lawrence at once." Consequently take advantage of this to obtain stock low, as they in Detroit and stockholders here have now given the whole matter up as surrendered to W. F. & Co. and forever lost. You can make any kind of trade you dictate there now. B. & W. stand in with Wadsworth, who is made to believe from Whitney that they can beat your mortgage. It might turn out that they would now refuse to accept the payment of their claim, preferring to stand pat, and hold, or try to acquire, property as it now stands. You must consider well this point, or find out from W. F. & Co. what they will do before making trade there. I would lose no time in taking some action to acquire the property now. If W. F. & Co. can be negotiated with and their title
416 acquired, the Detroit trade can be made on so much better terms than offered last winter. When I think you will be safe, as the mine is looked upon as one of the best here. Wadsworth estimates value at $500,000. Mine was $100,000 and $50,000 to develop, etc. I imagine Twiss & Hagen have intended to secure the property on this claim. There seems to be claims against the company, Hendrie Brothers, Rosborough & Merritt, Nesbitt and some others, working at the mines. Packard one year's time, no pay. The officer, Bennett & Whitney first employed by Griffith for Ward, afterwards recognized by him. Ball tells me today there were employed by trustees, after being qualified to defend some suits, etc., they will have claims for services. Ball says the thing has now gone up to W. F. & Co. Would been willing to contribute his portion to redeemed property from them. Says Wadsworth treated them shabbily, etc. Wadsworth has never been willing to contribute any advice as to payments by company. Always referring to officers of company, which he done with Bronson & Bates, Bronson being here at so late a day, was surprised to find property lost under the expired time of sale under execution.

WHITNEY.

417 EXHIBIT 6.

(From pages 142–'3, Bullion-Beck Case Record, vol. II.)

JOHN N. WHITNEY, a witness called and sworn on behalf of the Bullion, Beck & Champion Company, testified as follows:

I reside at Evanston, Wyoming, and attend this trial at the request of J. G. Sutherland.

I was an officer of the original Eureka Mining Company for two years. Was one of the persons who incorporated it, and was vice-president.

I am the John N. Whitney who is mentioned in the proceedings to obtain the patents of the Eureka and Montana lodes.

I applied for the patents of the Eureka and the Montana at the same time.

I was vice-president of the company from May, 1871, until the spring of 1873. Continued to hold stock afterward. I had charge of the work; was manager from 1871 to the fall of 1872. I directed the Eureka main shaft to be sunk where it is midway between the veins, so that both could be worked from it.

Q. Were the Eureka and Montana at that time considered and treated as two separate veins?

Objected to by Mr. Dickson as immaterial.

418 Objection overruled.

A. They were considered as two veins.

(Map shown to witness.)

Q. Have you ever seen this map?

A. I have; it was made in 1871, showing the workings that existed at that time from the Brown & Sperry shaft to the Beck shaft at the foot of the hill. This map shows the two veins as they were considered at that time.

Q. Who made the map?

A. I can't say whether it was Mr. Davis or Captain Wilder. Mr. Davis did surveying for the company.

Q. Did you verify the map yourself?

A. Yes, I helped make it. I was on the ground in 1873.

Map offered in evidence.

Objected to by Mr. Dickson on the ground that it is not drawn to scale, and that it is not properly verified.

Objection overruled.

Admitted in evidence, and marked Exhibit "Young 21."

WITNESS: At that time the Eureka was an open cut or stripping from the Brown & Sperry shaft to the Beck shaft.

Q. Do you know of the directors of the Eureka Mining Company issuing a prospectus in the year 1873?

419 Objected to by Mr. Dickson as irrelevant, immaterial and incompetent.

Objection overruled, and pamphlet admitted and marked Exhibit "Young 22."

EXHIBIT 8.

(Ex. 15 for *id.*)

JUNE 21*st*, 1888—3 p. m.

Mr. John N. Whitney.

DEAR SIR: Yours of the 13th and 15th from N. Y. just received since I mailed my letter to you. I note all you say, and in case

have to give my testimony will stick to the same as near as I can. You know that I have said to you before that I gave my check to Lawrence for $12,500 to pay my note at W. F. & Co. bank, which he said he had paid but did not bring the note to me until some days after I asked him for the note. He then said he would go to W. F. & Co. and get it, and returned soon after with it, and gave it to me, which I cancelled, and since put in safe with my papers, and do not know what became of it, and when L. returns from Detroit, he said out of the money he had received there was due us each either $3,125 or $3,250. He then gave us the $125 or $250 each, and the $3,000 he retained, and went into the mortgage, I suppose, with the $5,500. I never saw it. My check and note or
420 sight draft on Boston, on Dunbar, should show on W. F. & Co.'s books, if I could get to them, for $12,500.

I shall go into the country now, but all the letters will be forwarded to me. Have more or less rheumatics.

Yours in haste, W. H. WOOD.

Envelope.

John N. Whitney, Esq., Evanston, Wyoming T'y Stamped: June 21, '88, 8 p. m., San Francisco.

(Ex. 15 A for *id.*)

EXHIBIT 9.

(Ex. 12 for *id.*)

SAN FRANCISCO, *April* 3*rd*, 1888.

Mr. Whitney:

Would it not be well on your way back to Detroit to stop off at Detroit and make a memo. of the property from the records, that Ward deeded to Lawrence, and dates, etc.? I am sure there was a large vacant lot in the city. You don't mention. I am quite sure that it was in the fall of the year that L. called me to Salt Lake to be a witness to the suit that did not come off for the reason he compromised it. I think about that time; you know I came away to San Francisco. Was on my way home. Did not L. get the
421 30,000 Ward note discounted in New Bedford? Did not L. say when he came home from D. that he had 3,125 or 3,150 dolls. for each of us, and pay us the odd amount and retain the 3,000 and go into the mortgage with our 5,500.

You know I paid a note in cash for $12,500 or $15,000 in Tracey's bank. Gave L. the money and asked L. for the note afterwards, which he pretended to go to the bank and get, and handed to me.

I shall now be ready to go to Salt Lake or any place, if wanted in this place.

Drop me a line of your success in N. Y. Perhaps L. may conclude to compromise rather than to fi-ht. If so, set figures high.

Yours, etc., W. H. WOOD.

EXHIBIT 10.

(Ex. 18 for *id.*)

SAN FRANCISCO, MONDAY, *June 4th*, 1888.

Mr. John N. Whitney.

DEAR SIR: I have not a thing new to say—in relation—if anything is said or done on the side of Lawrence, why my affidavit is the same as yours. We can only say they were given by L. to us at the same time, written upon one of our old letter-heads of
422 the company in the Co. office, at same time, and handed to us by L., and by our requests that L. should give us something to show our interests. We compared and found them the same, etc. They may say I had no such paper, but his letter will show the same. You look over his, L., letters that A. & G. have. If anything more for me to sign (that I can), they must let me know what it is. I shall not write you again, as you will come home soon, I suppose. My att'y here, Mr. W. H. Sharp, died on the 1st, Friday. I saw him on Thursday, the day before in his office. Said that he had an insurance case to argue in court on and was very busy. He was taken in court, and taken home, and died the next day.

Hold L. fast if you can, and bring his milk.

W. H. W.

Envelope.

(Ex. 15 A for *id.*)

John N. Whitney, Esq., Evanston, Wyoming Ty.

EXHIBIT 11.

(Ex. K No. 11, W.'s dep'n.)

SALT LAKE CITY, TUESDAY, *Dec.* 22, 1874.

DEAR LAWRENCE: Yours of the 13th from Washington is
423 received. Last ev. I received letter from Romeyn, saying he had written you here. If you were not here, to let me know where he could communicate, etc. I write him Southern hotel, St. Louis. Trowbridge forwarded his letter Sherman house. Packard returned last Thursday ev. from the East, and went to Eureka Sunday. It is said he came back feeling bully. I have today seen and read the answer made to your suit in foreclosure. I was going to make copy and forward you. Hempstead tells me he has done so. It is thought the case cannot be reached in court before spring or summer. Trowbridge think- you made a mistake in delaying, and they that will fight it off until they get their money out of the mine, etc. That they now believe they have demonstrated that they have a mine of great value, and thinks you will receive overtures of com-

promise from Detroit. I see they charge that the books and minutes were in your handwriting, which is probably my own, and embodying the old Ward complaint pretty full in regard to conspiracy, in deceiving and causing the public to believe the property was of greater value than actually existed; and by that connivance placed the company in a fictitious debt, and caused the mortgage to be placed on the property after disposing of a large portion of the stock (by fraudulent representations) for the sole purpose of depreci-
424 ating the property, and eventually claiming possession under the same. The whole thing is brought up for the purpose of fight and time.

Nesbitt was here last week, and seemed to want to see you. Complained that he could not obtain anything for his services. Seemed quite severe in his remarks towards Packard and Geo. E. Whitney.

Millmen complain both of Packard and Nesbitt, in arranging for the purpose of the ore. Nesbitt says they have a body of ore in the air shaft above Brown and Sperry shaft (at a depth of 40 feet) 12 feet wide, and another at the Ashton cut at same depth, 15 feet wide, the whole of which goes over $100 in silver per ton. I learned today there is about sixty men working on the hill. It seemed to be the minds and opinion of all here, that the mine is proving itself to not only substantiate the opinions everybody formerly had, but one of the best properties in Utah.

There appears to be as much doing in Bingham and Little Cottonwood as in the summer, as well as in Ophir and Dry Canyon. Little snow in the mountains, and warm and pleasant in this valley.

I hear nothing from Juab Co. relative to the taxes yet. Hempstead thinks best to settle taxes and save any trouble that might arise from sale, etc. I know nothing of Packard's mission East, unless to learn how well the property is doing, etc. Trow-
425 bridge tells me he had a long talk with Ball, who says the company have paid $6,500 on the Wells-Fargo claim, and $2,000 to them for law expenses and watching the property. That they had an understanding with W. F. & Co. that they would take a sheriff's deed, then give company bond to transfer back, when the claim was fully paid. Nothing has been done, however, and they do not call for such a deed. Ball says W. F. & Co. act very strangely. He asked Ball if Packard brought back any money with him to pay off the claims; he said no, but thought he made arrangements that he could get such money when needed. Charley says Lawrence need not expect to ever obtain the property on his mortgage. That they (Detroit) will never let the property go with the present look and prospects now shown up and developed. Thinks they will effectually pay the mortgage rather than lose the property.

Yours, &c., WHITNEY.

EXHIBIT No. 12.

(Ex. T No. 20 to W.'s dep'n.)

(Ex. 20 for *id.*)

(Townsend House letter-head.)

SALT LAKE CITY, SUNDAY, *January* 3, 1875.

DEAR LAWRENCE: The enclosed telegram came here today, which I send you by mail.

426 Still, there may be some haste for an answer, or M. D. would not telegraph.

There may be some catch in letting him vote your stock, which may be in our favor. If you see it is, and think it best, advise him and Bro. C. A. that he can also vote the stock standing in my name, but now being owned and in the possession of C. A. Whitney, 34 Lake street, Chicago.

How does the death of E. B. Ward affect future prospects for recovering damages, for yourself as well as myself. Does it end now, or can the administrator be served in such suit brought?

I hear talk "perhaps not very reliable" that Wells-Fargo & Co. are going to take the mine on their sale, and pay your mortgage. That would be the proper course for you to obtain title, if in shape so to do. I hardly think they contemplate this course yet.

WHITNEY.

EXHIBIT 13.

(Exhibit 22 for *id.*)

SALT LAKE CITY, *Nov.*, 1875.

FRIEND WOOD: Lawrence is here looking to the prosecution of the foreclosure. Talks some of consolidation with Chisholm,

427 who holds the Wells-Fargo title, and now in possession and working the property. He claims to have advanced the $23,587.50 on his return from Europe and Detroit, it being the proceeds of from $25,000 in note made by himself, Lee and Mayhew, for which we put up 250 shares of Eureka stock. That on his second visit to Detroit, he had Ward's notes for $30,000 discounted, receiving $27,000, $10,000 of which was used to pay one of the notes for $10,000 endorsed by Lee and Mayhew. The balance, $17,000 he brought back with him. That the first $23,587.50 he paid into bank on return from Europe to settle overdrafts up to that time, and at conclusion of the Ward trade there was still further overdrafts amounting to $20,000, for which he gave his checks for. I have said to him that we do not understand the overdraft to have been of $23,587.50 from the time he left for Europe in 1872 up to the time of making the mortgage in November. That you and myself own each one-eighth of $25,000 and $5,500 each of $18,587.50, or $8,725 each in the mortgage and note $43,587.50 and interest.

Yours, &c., J. N. WHITNEY.

428 "EXHIBIT 14."

(Exhibit 23 for *id.*)

SALT LAKE CITY, *March* 31*st*, 1875.

William H. Wood, Esq.

DEAR SIR: Yours of the 20th and 25th received. I note what you say about Silver Eyelet, and have written Lawrence to have injunction removed at once. I today forwarded my stock to be sold. You better do the same.

Lawrence was called to Detroit the other day by the executors of Ward, when he was at once arrested under the old warrant. The prosecuting attorney at once entered a *non proseque* as to Lawrence and myself, which forever does away with the criminal charges. He then went back to New York, where he is now.

If Lawrence's mortgage holds water our interest in that as well as the stock we may hold there, I think will be represented to us to full interest, etc.

My inquiry to you was as to what you would take in Eureka for Valajo stock for your interest in the Mansion House property. You may admit that it is or is not exhausted, and place the usual value on such property in these times.

I am inclined to think Lawrence will beat them on the injunction suit.

If you prefer Eureka stock to Mansion House interest, state how you will exchange.

429 I find no Mineral Fork Mining and Smelting Co. Must be wildcat. We have cold weather here now. Have had big snowstorm in mountains.

Yours, &c., WHITNEY.

EXHIBIT 15.

(Ex. 21 for *id.*)

SALT LAKE CITY, *March* 15, 1875.

William H. Wood, Esq.

DEAR SIR: I have not yet received any reply to my letter addressed to you on the 3rd, asking what amount of Eureka or Valajo stock you would be willing to accept for your interest in the Mansion House property in Detroit.

Lawrence writes me that if he understands the case, that your interest there is exhausted by your not answering to the suit.

It being in Lawrence's name, but known to be really owned by us three, I know not how the final result is; however, our interest being one-eighth each, and from all I have been able to find out regarding its value, it could be disposed of for about $20,000. I am of the opinion that if Wells-Fargo Co. claim was settled against the Eureka, the stock would be quite as valuable as ever it was.

430 With this doubt regarding the interest in Detroit, if you have any propositions to make to exchange that interest for the

above stock, state how you desire to exchange or if you care to make any. We are now having the most severe snowstorm of the season.

Yours, &c., JOHN N. WHITNEY.

EXHIBIT 16.

(Exhibit 24 for *id.*)

EVANSTON, WYO., *Oct.* 3, 1887.

W. H. Wood, Esq., San Francisco, Cal.:

Your postal of 27 received this E. Very strange that letters to my address either to Park City or Salt Lake should be returned. Am real glad to have some tidings from you. I wrote you I should commence suit on Lawrence for settlement of my interest in the mortgage and Detroit real estate held in his name, and admitted by him in the certificate handed me at time of sale to Ward.

You was handed a like certificate, and may have lost it. He has been acting as trustee quite long enough. He has been paid $161,000 dividend, before the beginning of this year, and mine has been making lots of money this year. My lawyers are consulting the trusteeship, considering its age, and feel quite confident it is
431 a good claim, and say further, that owing to condition of his health now, he wants no trouble now, but will settle. He is very miserly now, and I say to them that he will fight to the bitter end rather than disgorge $50,000 now. When I see my attorneys will write result. In meantime please write me your views, and whether you desire to join with your claim, or come up and make talk with attorney at Salt Lake (Sutherland & McBride.) Lawrence has been East this past year, been in Salt Lake one day in the time. May have to get service by advertisement. Let me hear from you.

Yours, &c., J. N. WHITNEY.

I stop here at the ranch most of the time.

EXHIBIT 17.

(Ex. 21, Whitney's dep'n.)

WEST MILLBURY, *July* 18, '76.

FRIEND WHITNEY: Some time since I received a note from you, and not having anything new to say, said nothing.

I have been knocking around Boston, New York, Philadelphia, and having this awful hot weather, until I have got sick, and am housed, and have a doctor. Hope to get through it in a few days, but don't feel worth a cent.

432 When in Boston I go into the Silver Islet office, and find the report from the mine good, but no sales of any account. I will keep you posted on it, and if a chance does come, will get you out and myself. I met Hill (of the Winnemucca) in Philadelphia. How are things in Utah? And does Lawrence and you get along?

You know you and myself have about $17,000 of our money in the mortgage, besides our portion of the Detroit real estate, and if necessary have some money left to present my claims in court for a fair and honest judgment. It seems to me that we should commence and claim our rights very soon, by a suit, if in no other way. All I wish is what is justly due me.

Yours very truly, WM. H. WOOD.

EXHIBIT 18.

(Ex. A L for *id.*)

SAN FRANCISCO, *Feb.* 27, 1875.

Mr. John N. Whitney.

DEAR SIR: Yours of the 21st inst. is at hand. If we have no interest in the Detroit property you of course don't want it.

You don't say what the market price is for Eureka, or even it is of any value. If Mr. Lawrence forecloses his or our mortgage.

433 You know we each have an interest of $833.50 in the mortgage, as well as an interest in the Detroit property. In some way, we could find out the position of the Detroit property. Probably Mr. Lawrence would know or could find out, and the court in N.Y. for us to apply to — get the injunction removed upon the Silver Islet stock. I think some day that stock will be good, and think the same of the Eureka Hill.

I will try to see the paymaster on the island some time, but such men don't generally have much money to buy stock.

You don't say where Mr. Lawrence is at present, or how he is progressing in the suit, or how much the company have paid on the Wells, Fargo & Co. claim, or how much indebtedness still to pay.

Business of all kinds very dull here at present, and I am sick and tired of doing nothing.

Yours truly, WM. H. WOOD.

EXHIBIT 19.

(Ex. S.)

(Ex. 16, Whitney's deposition.)

FAIR HAVEN, MONMOUTH COUNTY, N. J.,
September 27th, '75.

DEAR WHITNEY: I am today in receipt of your three

434 favors of 19th and 20th (2), and am really glad to hear from you.

You ask what about Detroit matters, and the Indian vouchers. The enclosed letter will explain the Detroit matter. Before this, you have received my letter, and the Indian papers, or rather, the order sent to me with the reasons of not delivering or paying. I will be ready to start for Utah as soon as Hempstead advises me of the time the case will be called. At once write me just the number of shares of Eureka there was sold to satisfy the execution of Bennett & Whitney.

Has Woodman gone in with the other side? I judge so from your letter.

Remember me to Chambers.

Yours, &c., JOAB LAWRENCE.

Envelope.

John N. Whitney, Esq., Townsend house, Salt Lake City, Utah. Stamped: Fair Haven, N. J., Sept. 28.

(Written across end: Lawrence, Sept. 27, '75; Romeyn, Sept. 10, '75.)

435 EXHIBIT 20.

(Ex. A. C.)

FAIR HAVEN, MONMOUTH COUNTY, N. J., *Sept.* 27.

W. H. Wood, Esq.

DEAR SIR: I am in receipt of yours. Hempstead advises me that the foreclosure suit will come up probably in the October term, say about the last of the month.

Your interest in the mortgage is ($\frac{1}{8}$ of $25,000) $3,125.

The administrators of the Ward estate have given Romeyn notice of their intention to amend the Ward complaint, notwithstanding my demurrer to the complaint was sustained and the injunction removed as against me.

I have been spending a great deal of money and time in endeavoring to protect the Detroit property.

I now intend going to Salt Lake early in the next month.

I wish you would at once inform me when you will probably be ready to go West, or write me in Salt Lake.

Yours, &c., JOAB LAWRENCE.

Envelope.

William H. Wood, Esq., West Millbury, Mass. Stamped: Fair Haven, N. J., Sep. 28.

Ex. 20 was shown to have been mailed Sept. 27, 1875.

436 EXHIBIT 10.

(Ex. A M, Whitney *vs.* Fox.)

Supreme Court, City and County of New York.

JOHN N. WHITNEY and WILLIAM H. WOOD
against
JOAB LAWRENCE.

CITY AND COUNTY OF NEW YORK, *ss:*

Sarah M. Lawrence, being sworn, says:

I am the wife of Joab Lawrence, the defendant. I have read the affidavit of John N. Whitney, one of the plaintiffs, bearing date the

8th day of May, 1888. I remember well the visit of said Whitney at our apartments in New York city on the 6th day of April, 1888, and the conversation which took place. In my previous affidavit, bearing date the 9th day of May, 1888, I have detailed the conversation had at that time. I deny that Mr. Lawrence said "The Detroit property is in the same condition as when we acquired it; the mining stock, I don't know definitely how it stands. I hope to go to Salt Lake in a few months, and then I will settle with you," or anything of the kind. Mr. Lawrence made use of no such language. He was not able to talk so that Mr. Whitney could understand him. I had to interpret to Mr. Whitney the few words which he did utter. They are all detailed in my former affidavit. The statement of said Whitney as above quoted is false in every particular. I have heard the defendant speak of the plaintiffs, Whitney and Wood, but he has at all times claimed that he owed them nothing whatever, and all matters of business between him and them were settled long ago. He is unable on account of illness to make an affidavit in regard to the transactions stated in the moving affidavits.

SARAH LAWRENCE.

Sworn to before me, this 2nd day of June, 1888.

WILLIAM C. DAVIS,
Notary Public, N. Y. Co.

437 Plaintiff also offered in evidence among the exhibits a part of the files in the case of Joab Lawrence *vs.* The Eureka Mining Co., as follows, to wit:

438 CITY AND COUNTY OF NEW YORK:

N. Y. Supreme Court.

JOHN N. WHITNEY and WILLIAM H. WOOD, Plaintiffs,
against
JOAB LAWRENCE, Defendants.

The above-named plaintiffs by this complaint aver and allege:

1. That on or about the 7th day of October, 1872, these plaintiffs were each severally and respectively the owners of two hundred and fifty shares of the par value of $100 each of the capital stock of the Eureka Mining Company of Utah.

2. That these plaintiffs are informed and believe that at the said time the defendant herein, Joab Lawrence, was the owner and holder of at least fifteen hundred shares of the par value of $100 each of the capital stock of the said Eureka Mining Company.

III. That on or about the said 7th day of October, 1872, the parties hereto entered into a joint venture and enterprise in accordance with which these plaintiffs delivered to the defendant herein certificates representing the said two hundred and fifty shares of stock each then standing in their names upon the books of the said Eureka Mining Company, the said certificates being duly endorsed in

blank, to be held by the defendant in trust for the benefit and use of these plaintiffs and to be disposed of for their benefit; that it was at said time agreed between the said parties hereto that
439 the defendant herein should be the agent of the plaintiffs herein for the purpose of selling or otherwise realizing upon the said shares of stock so entrusted by these plaintiffs to the said defendant to the best advantage of them as owners and holders thereof and of receiving the consideration for such sale or transfer and of using the same for the benefit of the plaintiff-.

IV. That thereafter and on or about the 7th day of October, 1872, in accordance with and by virtue of the powers, trusts, and agencies hereinabove referred to, the defendant herein duly sold and transferred the said shares of stock above named respectively belonging to these plaintiffs and to himself jointly to one Eber B. Ward for the consideration, among other things, of certain real property situate, lying, and being in the city of Detroit, in the State of Michigan, consisting of three city lots and a building or hotel erected thereon, commonly known or designated as the Mansion house, and also the sum of $23,587.50 in money, and that with the exception of said lots and said money and the proceeds thereof the said defendant has duly accounted to these plaintiffs for the consideration for the sale of said shares of stock.

V. That thereupon the said defendant procured from said Ward a deed for said real property to him individually, which deed, as these plaintiffs are informed and believe, was duly delivered to the said Lawrence and was thereafter duly recorded in the manner prescribed by law; that, as these plaintiffs are informed and believe, the record title to said real property has since continued to be and now is in the defendant as absolute owner thereof; but these
440 plaintiffs allege that although the said property was conveyed absolutely to the said Lawrence individually that the said property was impressed with a trust for these plaintiffs in the proportion of the respective shares in the consideration paid for the said property owned by these plaintiffs or to which they were beneficially entitled, and that the said defendant, Joab Lawrence, has ever since continued to hold the said property jointly for himself and in trust for the use and benefit of these plaintiffs as aforesaid.

VI. And these plaintiffs further allege that the said defendant has ever since the 7th day of October, 1872, collected and still continues to collect the rents, issues, income, and profits of the said real estate situated in the city of Detroit and so as aforesaid conveyed to him.

VII. That after the transactions and sale of the stock hereinabove referred to the defendant herein, Joab Lawrence, while holding the said sum of $23,587.50 hereinabove referred to jointly for himself and as trustee for these plaintiffs and with the consent of these plaintiffs, on or before the 9th day of November, 1872, loaned the said sum of $23,578.50 to the said Eureka Mining Company.

VIII. And these plaintiffs further allege that on or about the 4th day of November, 1872, the said Eureka Mining Company was

justly indebted to the parties to this action in the following further amounts, to wit, to the plaintiffs herein in the sum of $5,500 each and to the defendant in the sum of $9,000.

IX. That the better to secure the repayment of the said sums of $5,500, $5,500, and $9,000 respectively due to the parties to
441 this action, aggregating the sum of $20,000, and also to secure the said sum of $23,587.50 so as aforesaid loaned to the said company, the said Eureka Mining Company, on the 9th day of November, 1872, duly made, executed, and delivered its certain indenture of mortgage or trust deed, dated on that day, to secure such repayment to one Theodore F. Tracy, trustee, of the sum of $43,587.50, which said indenture of mortgage or trust deed was thereafter duly recorded as prescribed by law on the 5th day of August, 1873, in Book "E," p. 453, &c., in the office of the county recorder of Juab county, Territory of Utah, and on the 29th day of May, 1874, in the office of the county recorder of Utah county, in said Territory, in Book "E," p. 398, &c.

X. And these plaintiffs further allege that the said trust deed to the said Tracy, trustee, was duly made, executed, and delivered equally for the benefit and security of these plaintiffs jointly with the defendant in the proportions to which they had each contributed a proportionate part of the consideration therein mentioned and thereby secured.

XI. That the plaintiffs are informed and believe that thereafter and prior to the 6th day of August, 1874, the said Eureka Mining Company having made default in one or more of the covenants, conditions, or obligations in said trust deed expressed to be kept and observed by it, the said Theodore F. Tracy, as trustee, having duly assigned said trust deed and the debt secured thereby to the defendant herein, the said defendant took proceedings to foreclose the equity of redemption of the said Eureka Mining Company
442 in the property covered by said trust deed, and that thereupon, in due course and on or about the 27th day of July, 1876, a decree was duly made and entered foreclosing the equity of redemption of the said mining company in said premises and decreeing a sale thereof, and that thereafter and in pursuance of said decree the said property in the said trust deed described was sold on the 9th day of September, 1876, and conveyed to the said Joab Lawrence, the defendant herein, individually by deed dated the 13th day of March, 1877, and recorded in the office of the county recorder of Juab county, Territory of Utah, on the 27th day of March, 1877, in Book "C," p. 568.

XII. That thereafter such negotiations were had that all the right, title, and interest which the said defendant had acquired by reason of such decree of foreclosure and sale therein and as beneficial owner in said trust deed was conveyed by the said defendant to the Eureka Hill Mining Company by deed dated the 14th day of March, 1877, and recorded in the office of the county recorder of Juab county on the 27th day of March, 1877, in Book "G," p. 572, &c., and that the consideration for said transfer was three-tenths of the entire capital stock of the said Eureka Hill Mining Company,

to wit, three thousand (3,000) shares of the capital stock of said company, of the par value of $100 each, which said shares were duly delivered and transferred to the defendant herein.

XIII. That through all these transactions the said defendant was acting not only on his own behalf, but also on behalf and for the use and benefit of these plaintiffs and with the consent of these plaintiffs, according to their respective shares in the consideration expressed to be secured by the said indenture of mortgage or
443 trust deed, and that, although the said stock and certificates representing the same stood on the books of the said Eureka Hill Mining Company in the name of the said Lawrence individually, nevertheless they were delivered and transferred to said Lawrence and held by him jointly for himself and as trustee for these plaintiffs in the respective proportions in which they had contributed the consideration therefor with the said Lawrence and were charged with a trust to that extent, and that the said shares are still so held by said Lawrence for himself and as trustees charged with said trust.

XIV. These plaintiffs further allege that they are informed and believe that the said Eureka Hill Mining Company has from time to time declared dividends upon its capital stock; that the proportion of such dividends payable upon the shares of the capital stock so held by said defendant Lawrence as aforesaid have from time to time been paid to, collected, and received by the said defendant Lawrence; and these plaintiffs are informed and believe that the amount of dividends so paid to, collected, and received by said Lawrence amounts to a large sum of money, the precise amount of which these plaintiffs are unable to state.

XV. These plaintiffs further allege that they are informed and believe that the business of the said Eureka Hill Mining Company has continued, is now continuing, and will continue to be operated at a large profit, so that dividends are and will be continually accruing upon its capital stock and upon the shares so held by the said Lawrence jointly for himself and as trustee and impressed with a trust for these plaintiffs as aforesaid.

XVI. That the defendant herein has repeatedly admitted
444 to these plaintiffs during all the transactions hereinabove set forth and up to the present time that he held the real property above described and situated in the city of Detroit, in the State of Michigan, and the said shares of the capital stock of the Eureka Hill Mining Company jointly for himself and as trustee for these plaintiffs, and that he has never denied the existence of the said trust or claimed that he held the real or personal property aforesaid in any other way than jointly for himself and for the benefit of these plaintiffs in the proportionate shares to which the said plaintiffs have shown themselves to be entitled.

XVII. That the plaintiffs herein have from time to time inquired of the said defendant as to the said trust estate so held by him and have requested and duly and formally demanded that the said defendant account to these plaintiffs for their respective shares so held by him in trust for their use and benefit, but that, although the said

defendant has constantly, uniformly, admitted to these plaintiffs that he held said property jointly for himself and in trust for them, the said defendant has hitherto neglected and refused to account for and pay over to these plaintiffs in any manner, either for the trust property so held by him for the benefit of these plaintiffs or for the rents, issues, profits, and dividends accrued or accruing thereon and received by him jointly for himself and as such trustee.

XVIII. And these plaintiffs further allege that—the record title of said real estate in the city of Detroit standing upon the books of record in the name of the said defendant individually, and not showing upon the face of said record that any person or
445 persons other than the defendant are beneficially interested in said property, the said defendant might and could convey a good title to said property as against these plaintiffs to an innocent purchaser thereof without notice, and that thereby the rights of these plaintiffs to their respective shares in said real estate might and could be conveyed by said trustee without the knowledge and consent of said plaintiffs, and the purchaser thereof might and could take an absolute and valid title to said property free of and discharged from any claim of these plaintiffs.

XIX. And these plaintiffs further allege that the certificates for the shares of capital stock in the said Eureka Hill Mining Company, and the said shares of the said capital stock standing, as they do, absolutely in the name of the defendant individually, are negotiable securities passing from hand to hand by delivery, and are transferable upon the books of the Eureka Hill Mining Company by the defendant individually, either in person or by attorney, and that these plaintiffs are informed and believe that it is the custom to sell and transfer shares in the capital stock of corporations organized in the manner in which the Eureka Hill Mining Company is organized by delivering to the purchaser thereof the certificate representing such capital stock endorsed by the registered owner thereof, and that if such transfer were so made to an innocent purchaser of said shares or the certificate representing the same for value without notice the said purchaser would have a valid title to said shares and the certificate representing the same as against these plaintiffs.

XX. That there is great danger that the defendant herein
446 may so transfer the said real property and the said shares of stock in the said Eureka Hill Mining Company and the certificates representing the same to such innocent purchaser or purchasers without notice, and that such sale and transfer or a like disposal of said real and personal property would produce irreparable injury to these plaintiffs and would prevent the benefits from the recovery of a judgment in this action and render any judgment herein ineffectual, and if the said property should be in any way disposed of it might entirely defeat and destroy the rights of these plaintiffs in and to the said real and personal property and might deprive the plaintiffs herein of any claim which they might have to the same.

Wherefore the plaintiffs pray judgment:

First. That the said real property situated in the city of Detroit, in the State of Michigan, and the said shares in the said capital stock of the said Eureka Hill Mining Company and the certificates representing the same be impressed with a trust in favor of these plaintiffs for the proportionate share of the consideration to which these plaintiffs were and are entitled, and that the said defendant be adjudged and decreed to have held and to hold the said property jointly for himself and as trustee for the use and benefit of these plaintiffs as aforesaid.

Second. That the defendant, his servants, agents, and attorneys, be forever enjoined and restrained from selling, delivering, or transferring the said real and personal property or any part thereof or assenting to such sale, transfer, or other disposition thereof in so far as such transfer and disposition affects or could affect or dis-
447 pose of the interests of the plaintiffs in said real and personal property, as in the complaint alleged, or from suffering or allowing any matter or thing whereby the rights and interests of the plaintiffs in said personal property could or might in any way be impaired, destroyed, or affected.

Third. That the defendant be decreed to account to these plaintiffs for the proportionate share of property, both real and personal, so received and held by the defendant herein as trustee for the benefit and use of these plaintiffs and any increase thereof, and to account for all rents, issues, profits, income, and dividends accrued and accruing from the said properties, both real and personal, or any increase thereof, and that the said defendant be decreed to pay over and transfer to these plaintiffs the property so held in trust by him for these plaintiffs, and any increase or proceeds thereof, and also all rents, issues, profits, and income thereof which may be found to be due to said plaintiffs, the amount thereof to be determined by the court or a referee thereby appointed.

Fourth. That a receiver may be appointed in this action to hold the shares of stock and the certificates representing the same in the capital stock of the Eureka Hill Mining Company, or to dispose of the interests of the plaintiffs in said stock and certificates in such way as this court shall direct, and that the defendant or his servants, agents, or attorneys having the custody of the said shares of stock or certificates representing the same deliver the same to the said receiver during the pendency of this action.

Fifth. That during the pendency of the action the defend-
448 ant, his agents, servants, attorney or attorneys, or any person claiming under them or either of them, be enjoined and restrained from delivering, selling, disposing of, or parting or interfering with the said real and personal property so far as concerns the interests of the plaintiffs therein until and unless otherwise ordered and directed by this court.

Sixth. That the plaintiffs have such other and further relief as to this court may seem just, together with the costs of this action.

ALEXANDER & GREEN,
Attorneys for Plaintiffs.

Office & P. O. address, 120 Broadway, New York city, N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

John N. Whitney, being duly sworn, says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as — those matters he believes it to be true.

JOHN N. WHITNEY.

Sworn to before me this 10th day of April, 1888.

ALLEN McCULLOH,
Notary Public, N. Y. County.

CITY AND COUNTY OF NEW YORK, *ss:*

John N. Whitney, being duly sworn, says that he is the attorney-in-fact for William H. Wood, one of the plaintiffs herein, for the prosecution of this action; that he has read the foregoing
449 complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is not made by the said plaintiff, William H. Wood, is that the said plaintiff is without the county and State of New York, the said plaintiff being a resident of the city of San Francisco, in the State of California.

That the sources of deponent's information and the grounds of his belief are statements made by the said plaintiff, Wood, to deponent, the papers and proceedings in the complaint set forth, as well as deponent's knowledge as such attorney-in-fact and as one of the plaintiffs in this action.

JOHN N. WHITNEY.

Sworn to before me this 10th day of April, 1888.

ALLAN McCULLOH,
Notary Public, N. Y. County.

450 Supreme Court, City and County of New York.

JOHN N. WHITNEY and WILLIAM H. WOOD
against
JOAB LAWRENCE.

Answer.

The defendant above named, in answer to the plaintiffs' complaint, shows and states as follows:

First. For a first defense this defendant alleges upon information and belief that there is a misjoiner of parties plaintiff for the reason that there was not a joint interest in the plaintiffs in respect to any of their business transactions with the defendant and in respect to any of the matters referred to in the complaint, but, on the con-

trary, he alleges that whatever business relations he had with them or either of them were several and not joint.

Second. And for a second defense this defendant denies that he has any knowledge or information sufficient to form a belief as to whether the plaintiffs herein were, on the seventh day of October, 1872, or at any other time, each, severally and respectively, the owners of two hundred and fifty shares, of the par value of $100 each, of the capital stock of the Eureka Mining Company of Utah or of any other number of shares; but this defendant admits that at that time he was the owner of not only 1,500 shares, but alleges that he was the owner of about 2,200 shares of said stock of the par value of $100 a share.

451 And this defendant, further answering, denies upon information and belief that on or before the said seventh day of October, 1872, or at any other time, the parties to this action entered into a joint venture and enterprise in accordance with which these plaintiffs delivered to the defendant herein certificates representing the said two hundred and fifty shares of stock each then standing in their names upon the books of the said Eureka Mining Company, the said certificates being duly endorsed in blank, to be held by the defendant in trust for the benefit and use of these plaintiffs and to be disposed of for their benefit, and he denies that it was at that or any other time agreed between the said parties hereto that the defendant should be the agent of the plaintiffs or either of them for the purpose of selling or otherwise realizing upon the said shares of stock so entrusted by the plaintiffs to the said defendant to the best advantage of them as owners and holders thereof and of receiving the consideration for such sale or transfer and of using the same for the benefit of these plaintiffs or for either of these purposes.

And this defendant, further answering, denies upon information and belief that on or about the seventh day of October, 1872, or at any other time, in accordance with and by virtue of the powers, trusts, and agencies hereinabove referred to or in any other way he duly sold and transferred the said shares of stock above named respectively belonging to these plaintiffs and to himself jointly to one Eber B. Ward for the consideration, among other things, of certain real property situate, lying, and being in the city of Detroit,

452 in the State of Michigan, consisting of three city lots and a building or hotel erected thereon commonly known or designated as the Mansion house, and also the sum of $23,587.50 in money. He admits that he bought said Mansion House property and took the title in his own name and has at all times since held it and still holds it and has not accounted to the plaintiffs or either of them for any of the rents accruing from the property, which rents have been small over and above the expense of carrying the property, but he denies that the plaintiffs or either of them had or has any claim upon or interest therein.

And this defendant, further answering, alleges upon information and belief that in and by the laws of Michigan in force during all the times mentioned in the complaint and still in force it is provided that "No estate or interest in lands other than leases for a

term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared unless by act or operation of the law or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same or by some person thereunto by him lawfully authorized by writing."

And this defendant, further answering, upon information and belief alleges that in and by the laws of Michigan in force during all the times mentioned in the complaint and still in force it is provided that "Where a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in
453 the person named as the alienee in such conveyance, subject only to the provisions of the next section," which next section provides that "Every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration, and where a fraudulent intent is not disproved a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands."

And this defendant, further answering, alleges upon information and belief that in and by the laws of Michigan in force at all times mentioned in the compalaint and still in force it was provided that "No person shall bring or maintain any action for the recovery of any lands or the possession thereof or make any entry thereupon unless such action is commenced or entry made within the time herein limited therefor, after the right to make such entry or to bring such action shall have first accrued to the plaintiffs or to some person through whom he claims, to wit, within fifteen years."

And this defendant, further answering, upon information and belief denies that there was at any time an acknowledgment of any interest in the plaintiffs or either of them in said lands, but alleges upon information and belief that if any cause of action arose against the defendant at any time in reference to the lands mentioned in the complaint such action accrued more than fifteen years before the commencement of this action, and that all rights therein were barred by the statute of limitations.

And this defendant, further answering, alleges upon information and belief that in and by the laws of Michigan in force at
454 the times mentioned in the complaint and still in force, it is provided that all actions of debt founded upon any contract or liability not under seal, except such as are brought upon the judgments or decree- of some court of record of the United States or of that or some other of the United States, and all actions for arrears of rent and all actions of assumpsit or upon the case founded upon any contract or liability, express or implied, shall be commenced within six years next after the cause of action shall accrue and not afterwards, and that all personal actions on any contract not limited by the foregoing sections or of a law of that State shall be

brought within ten years after the accruing of the cause of action and not afterwards; and this defendant alleges and contends that if any cause of action arose against this defendant at any time respecting rents and profits of any lands in Michigan the same is barred by the statute of limitations.

And this defendant, further answering, admits that the record title of said lands in Michigan is and at all times since the purchase by him has been in him, with a claim of absolute ownership in him; and he denies that the said property was impressed with a trust for these plaintiffs or either of them in proportion of the respective shares in the consideration alleged to be paid for the said property alleged to be owned by them or to which they were beneficially entitled, or that the defendant has ever since continued to hold the said property jointly for himself and in trust for the use and benefit of the plaintiffs or either of them.

And this defendant, further answering, admits that ever since the seventh day of October, 1872, he has collected and still
455 continues to collect the rents, issues, and profits of the said real estate situated in the city of Detroit, so as aforesaid conveyed to him, and alleges that he has held the same adversely to these plaintiffs and all other persons.

And this defendant, further answering, denies that the sum of $23,587.50 mentioned in the complaint came from or was in any way connected with the transaction with Eber C. Ward in relation to the property in Detroit, Michigan, or that he ever held said sum jointly for himself and as trustee for these plaintiffs, or that with the consent of these plaintiffs or either of them he, on or about the ninth day of November, 1872, loaned the said sum of $23,587.50 to the Eureka Mining Company; but, on the contrary, alleges that long before the purchase of the said land from said Ward or even negotiations commenced for this purpose he had loaned the said sum of $23,587.50 out of and from his own private and exclusive funds to said company, and that at no time had the plaintiffs or either of them any interest therein.

And this defendant, further answering, admits upon information and belief that about the fourth day of November, 1872, the said Eureka Mining Company was indebted to the parties to this action in the sums of $5,500, $5,500, and $9,000 respectively, and to other parties in the same manner, making upwards of $30,000; but he alleges upon information and belief that said sums were paid to the said parties in cash before said mortgage was made, and that no part thereof went into or was secured by the mortgage to Theodore Tracy, trustee, mentioned in the complaint; but, on the contrary, he alleges that he loaned to the said Eureka Mining
456 Company, on the 6th day of November, 1872, the $20,000 in cash, which, together with the $23,587.50 theretofore loaned by him to the said company, constituted the sole consideration for the note given for the sum of $43,587.50 and for the mortgage given to said Theodore Tracy, trustee, to secure the same, and that no part of the consideration for said note or mortgage ever came

from the plaintiffs or either of them. The mortgage is dated and recorded as stated in the complaint.

And this defendant, further answering, denies upon information and belief that the said mortgage to said Tracy, trustee, was made, executed, and delivered equally for the benefit and security of these plaintiffs jointly with the defendant in the proportions to which the plaintiffs allege that they had contributed a proportionate part of the consideration mentioned and secured, and denies that either of the plaintiffs had any interest therein.

And this defendant, further answering, admits that the Eureka Mining Company made default in the covenants and conditions of the said mortgage, and that the said Tracy, trustee, assigned the trust deed or mortgage and the debt secured thereby to the defendant herein, who took proceedings to foreclose the equity of redemption of the said Eureka Mining Company, and that a decree was made foreclosing such equity of redemption and decreeing a sale of the mortgaged premises, and that on a sale thereof the said property was bought by this defendant herein and conveyed to him individually by deed dated the 13th day of March, 1877, and recorded as stated in the complaint.

And this defendant, further answering, admits that there-
457 after such negotiations were had that all the right, title, and interest which he acquired by reason of such decree of foreclosure and sale was conveyed by him to the Eureka Hill Mining Company, a corporation organized under and by virtue of the laws of Utah, on or about the 15th day of November, 1875, a corporation different from the Eureka Mining Company above mentioned, and that the consideration of such transfer was 3,000 shares of the capital stock of said Eureka Hill Mining Company, which stock has at all times stood in his name and been claimed and is still claimed by him as his exclusive property, and he denies that the plaintiffs or either of them ever had or now has any claim upon or interest in said stock or any part thereof.

And this defendant, further answering, denies upon information and belief that in any of the before-mentioned transactions he was acting on behalf and for the use and benefit of these plaintiffs or either of them with their consent, or that he ever asked or was obliged to ask their consent thereto according to their alleged respective shares in the consideration expressed to be secured by the said indenture of mortgage or trust deed or in any other way. He admits that the said shares of stock stand in his name individually, and denies that they were delivered and transferred to him and held by him jointly for himself and as trustee for these plaintiffs or either of them in the respective portions in which they allege that they contributed to the consideration therefor, or that they are charged with a trust to that extent or any other, and he denies that such shares are held by him as a trustee charged with any trust,
458 but has at all times claimed and still claims to hold them for himself alone.

And this defendant, further answering, admits that the said Eureka Hill Mining Company has from time to time declared divi-

dends upon its capital stock, and that he has received such dividends, the precise amount whereof he is not able to state.

And this defendant, further answering, admits that during some portion of the time the said Eureka Hill Mining Company has been operated at a profit, but he has no knowledge or information sufficient to form a belief as to whether the said dividends will be continually accruing, but if such should be the case he denies upon information and belief that such dividends are or will be impressed with a trust in favor of the plaintiffs or either of them.

And this defendant, further answering, denies upon information and belief that he has admitted to these plaintiffs or either of them during all of these transactions hereinabove set forth and up to the present time that he held the real property above described and situated in the city of Detroit, Michigan, and the said shares of the capital stock of the Eureka Hill Mining Company jointly for himself and as trustee for these plaintiffs, but, on the contrary, alleges that neither of the plaintiffs, until about the time of commencing this action, ever claimed that he held the aforesaid property jointly for himself and then and there when plaintiff Whitney made the claim the same was denied, and he alleges that he has at all times denied the existing of said alleged trust and the claim that he held the real and personal property aforesaid in any other way than jointly for himself and for the benefit of these plaintiffs in the proportionate shares to which the plaintiffs allege that they were entitled.

459 And this defendant, further answering, denies upon information and belief that the plaintiffs have from time to time inquired of the said estate and requested and demanded that the defendant account to these plaintiffs for their respective shares so alleged to be held by him in trust for their use and benefit, or that he has constantly uniformly admitted to these plaintiffs that he held said property jointly for himself and in trust for them, but he admits that he has not accounted to them for any part of the rents, issues, profits, and dividends of said property for the reason that they belong to him alone.

And this defendant, further answering, admits that the title to the said premises in Detroit is in his name individually, and that there is nothing upon the face of the record showing an interest therein in the plaintiffs or any other person, and that during all the time since the conveyance thereof to him a deed from him would have conveyed a good title, subject to his wife's dower; but he denies that in case of any sale any rights of the plaintiff or either of them would be affected thereby, or that they have any interest therein.

And this defendant, further answering, admits that the said shares of stock of the Eureka Hill Mining Company stand in his name individually as they have stood since they were issued to him in 1877, and that he might have conveyed a good title to them to any person by delivery, and that it is customary to sell and transfer stock of that character in that way, and that a purchase and transfer from him in this way would convey a good title thereto to a

purchaser; but he denies that there is great or any danger
460 that he may so transfer the said real property or the said shares of stock in the said Eureka Hill Mining Company, or that such transfer, if made, would produce irreparable injury or any injury to these plaintiffs or either of them, or that it would prevent the benefits from the recovery of any judgment in this action or render any such judgment ineffectual or in any respect impair the same, as he is and at all times since he obtained said property has been abundantly able to respond for its value and is so able now.

And this defendant, further answering, says that during all the times mentioned in the complaint he and the plaintiff Whitney have been and still are residents of Salt Lake City, Utah, and during some of the time the plaintiff Wood has also been a resident of Salt Lake City, although he is informed and believes that at the time of commencing this action the said Wood was and still is a resident of the State of California; that during all this time an action at law or in equity might have been brought against him in the court of Utah, in which Territory the Eureka mine is situated and where the cause of action, if any, arose and where the evidence in the cause is chiefly to be obtained; that any judgment that could be obtained in the action might at any time have been collected; but that although he has often met the plaintiffs in Utah and they had or might have had with a little inquiry full knowledge of the condition of the Eureka mine and the dividends paid by said Eureka Hill Mining Company upon its stock, yet they have made no claim upon him for any of the property mentioned in the com-
461 plaint or intimated that they had an interest therein until the sixth day of April, 1888, when the claim was not admitted; that during much of the time said mine was carried on by means of advances of money made by the defendant and others, not these plaintiffs, when the stock was considered to be of little value; but during all this time neither of these plaintiffs advanced any money towards the development of the mine or claimed any interest therein, as all matters between the plaintiffs and this defendant had long before been settled and adjusted.

And this defendant, further answering, denies each and every allegation in the complaint not herein specifically admitted or denied.

Third. And for a third defense the defendant shows and states upon information and belief that in and by the laws of the Territory of Utah in force at the times mentioned in the complaint and still in force it is provided that all actions on a contract obligation or liability in writing must be brought within four years after the same accrues and not thereafter; that all actions for the recovery of personal property must be brought within three years after the cause of action accrues and not thereafter; that any action on a contract or liability not a written instrument, the action must be brought within two years after the same accrues and not thereafter, and that all actions for relief not otherwise provided for must be brought within four years after the cause of action accrues and not thereafter.

And it is also provided in and by said laws of the Territory of Utah in force at all times mentioned in the complaint and still in force that no acknowledgment or promise shall be sufficient
462 evidence of a new or continuing contract whereby to take the case out of the operations of the statute of limitations unless the same be in writing, signed by the party to be charged thereby.

And this defendant, further answering, says that the cause of action set forth in the complaint did not accrue within four years before the commencement of this action, and that no acknowledgment of indebtedness or claim has been made, and that by the laws of Utah, where the plaintiff and this defendant resided, the cause of action, if true and at any time existing, would long before the commencement of this action have been and was barred by the statute of limitations.

Wherefore the defendant demands judgment of dismissal of the complaint with costs.

JACOB F. MILLER,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

Moylan C. Fox, of Salt Lake City, Utah, being duly sworn, says that he is the agent of Joab Lawrence, the defendant in the above-entitled action; that the foregoing answer is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. The reason why this verification is not made by the defendant is that the defendant is very sick and unable on account of sickness to make it and is absent from the county of New York, where the attorney for the defendant resides. Before his sickness he gave deponent a full power of attorney to act for him in all his business matters, including the conduct of acting in courts, which
463 power is still in full force. He has acted as agent for the defendant in all his business affairs for several years last past. The sources of his information and grounds of his belief are statements made to him by defendant and Charles W. Bennett, the attorney for defendant at Salt Lake City, who is conversant with defendant's affairs respecting the transactions referred to in the complaint and answer, inspection of the books and papers containing entries of the transactions of the Eureka Mining Company, his own personal knowledge of some of the transactions, and information respecting the remainder, his acquaintance with the parties to the action and their affairs and with the affairs of the Eureka Hill Mining Company, and possession of some of the papers referred to in the complaint and answer; that the statements made to him as aforesaid he believes to be true.

MOYLAN C. FOX.

Sworn to before me this 9th day of May, 1888.
WILLIAM C. DAVIS,
Notary Public, N. Y. Co.

464 The following was read in evidence by the plaintiff from the records of the below-entitled cause:

In the District Court of the First Judicial District of Utah Territory, County of Utah.

JOAB LAWRENCE, Plaintiff,
vs.
THE EUREKA MINING COMPANY OF UTAH and WELLS, FARGO AND COMPANY, Defendants.

The said plaintiff complains in this action against the said defendant- and alleges—

That the defendant The Eureka Mining Company of Utah is and was at the time hereinafter mentioned a corporation organized and existing under and by virtue of the laws of Utah Territory.

That the defendant Wells, Fargo and Company is and was at the times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of Colorado Territory.

That on the 15th day of September, 1872, at Salt Lake City, in the Territory of Utah, the said defendant, The Eureka Mining Company of Utah, made, executed, and delivered to one Theodore F. Tracy, trustee, its promissory note bearing date on that day, whereby, for value received, said Eureka Mining Company of Utah
465 promised to pay six months after date thereof to the order of said Theodore F. Tracy, trustee, the sum of forty-three thousand five hundred and eighty-seven $\frac{50}{100}$ dollars, negotiable and payable at the banking-house of Wells, Fargo and Company, in Salt Lake City, without defalcation or discount, with interest thereon, at the rate of twenty per cent. per annum, from the date thereof until paid, both before and after judgment; which note is in the words and figures following, to wit:

"Office of the Eureka Mining Company, Utah.

"Joab Lawrence, president; John N. Whitney, vice-president; William A. Wood, secretary and treasurer.

"$43,587.50. SALT LAKE CITY, UTAH, *September 15th*, 1872.

"Six months after date, for value received, the Eureka Mining Company of Utah promises to pay to the order of Theodore F. Tracy, trustee, forty-three thousand five hundred and eighty-seven $\frac{50}{100}$ dollars, negotiable and payable at the banking-house of Wells, Fargo and Company, in Salt Lake City, without defalcation or discount, with interest, at the rate of twenty per cent. per annum, from date until paid, both before and after judgment.

"THE EUREKA MINING CO. OF UTAH,
"[CORPORATE SEAL.] By JOAB LAWRENCE, *President.*"

That thereafter and before the maturity of said promissory note the said Theodore F. Tracy, trustee, endorsed and delivered the said

promissory note to this plaintiff, who is now the holder and owner thereof.

466 Plaintiff further alleges that the said defendant, The Eureka Mining Company of Utah, in order to secure the payment of the said principal sum and interest as stipulated in said promissory note according to the tenor thereof, did execute under its corporate seal and deliver to the said Theodore F. Tracy, trustee, a certain mortgage bearing date the 9th day of November, 1872, and by the said mortgage the said Eureka Mining Company of Utah granted, bargained, sold, aliened, released, conveyed, and confirmed unto the said Theodore F. Tracy, trustee, all and singular the mining property, lodes, mines, leads, or deposits of the said Eureka Mining Company of Utah, situate, lying, and being on Eureka hill, in Tintic mining district, near Eureka City, in Juab county, Territory of Utah, described as follows, to wit: The Eureka lode, a vein or deposit of silver-bearing rock, and the land and premises appurtenant thereto, embracing twenty-two hundred linear feet of said lode, to wit, 1,000 feet extending southerly from the discovery stake thereon and 1,200 feet extending northerly from said discovery stake on the northern extension of said Eureka lode, more particularly — in the application of said Eureka Mining Company of Utah for a patent thereon from the United States as follows: The presumed direction of said lode is from said discovery stake S. 12 deg. 20′ E. 400 feet; thence S. 2 deg. 45′ E. 600 feet, and again from the same stake N. 19 deg. 47′ W. 1,200 feet, and the said premises and area of land is therein further described as beginning at a monument at the northwest corner of said area and premises which is situate N. 75 deg. 35′ W. of and distant 103 feet from United States mineral monument No. 2, and running thence south 19 deg. 47′ E. 1,200 feet; thence south 12 deg. 40′ east 400 feet;

467 thence S. 2 deg. 45′ E. 600 feet; thence N. 70 deg. 13′ E. 140 feet; thence N. 2 deg. 45′ W. 600 feet; thence N. 17 deg. W. 1,200 feet; thence S. 70 deg. 13′ W. 200 feet to the place of beginning, and containing 8.888 acres, more or less, as shown in the diagram and field-notes of survey accompanying said application; also the Montana lode, a vein or deposit of silver-bearing rock, and the land and premises appurtenant thereto, embracing twenty-two hundred linear feet on and along said Montana lode, being 1,200 feet of Montana discovery location and 100 feet Montana northern extension, more particularly described in the application of said Eureka Mining Company of Utah for patent thereof as follows: The presumed direction of said lode from the discovery stake thereof is S. 9 deg. E. 400 feet; thence S. 2 deg. 45′ E. 600 feet, and from the same stake N. 56 deg. 10′ W. 1,200 feet, and said premises and area are therein fully described as beginning at a monument at the northwest corner of said area which is situate N. 38 deg. 12′ E. of and distant 135 feet from the United States mineral monument No. 2, and running thence N. 75 deg. 45′ E. 125 feet; thence S. 15 deg. 10′ E. 1,200 feet; thence south 9 deg. E. 400 feet; thence S. 2 deg. 45′ E. 600 feet; thence S. 79 deg. 45′ W. 65 feet; thence north 2 deg. 45′ W. 600 feet; thence N. 11 deg. 15′ W. 400 feet; thence N. 17

deg. W. 1,200 feet to the place of beginning, containing 4.292 acres, as shown in diagram and field-notes of survey accompanying said application.

Also the Eureka Twin lode, a vein or deposit of silver-bearing rock, and the land and premises appurtenant thereto, embracing two thousand linear feet of and upon said lode, being 1,200
468 feet northerly and 800 feet southerly from discovery stake thereof, together with a space 100 feet in width on each side thereof extending throughout said claim.

Also the Young Lion lode, a vein or deposit of silver-bearing rock, and the land and premises appurtenant thereto, embracing two thousand two hundred linear feet of and upon said lode, being 1,000 feet of Young Lion discovery location and 1,000 feet Young Lion northern extension and 200 feet of Young Lion southern extension, together with a space 100 feet in width on each side of said lode extending throughout said claim.

Also the Left Bower lode, a vein or deposit of silver-bearing rock, and the land and premises appurtenant thereto, embracing six hundred (600) linear feet of and upon said lode, extending southerly from the discovery stake thereon, with a space 100 feet in width on each side thereof extending throughout said claim.

Also the Deseret lode, a vein or deposit of silver-bearing rock, and the land and premises appurtenant thereto, embracing two thousand two hundred linear feet of and upon said lode, being 1,000 feet of Deseret discovery location and 1,000 feet of Deseret northern extension and 200 feet of Deseret southern extension, with a space 100 feet in width on each side thereof extending throughout said claim.

And also all and singular the work shafts and tunnels of said mines, and also the ores, lead and silver, and gold-bearing rock on the dumps of said mines, and the tools, material, and ma-
469 chinery at and used about the same mines, and also the buildings, lots, offices, and properties, both personal and real, belonging to said Eureka Mining Company of Utah, situate in said town of Eureka City, county and Territory aforesaid, the same being two lots in said town of Eureka, with stone house erected thereon, used as the office of the company, with furniture thereof, and also all that certain quartz mill, with machinery, tools, material, and the land appurtenant thereto, belonging to said company, and known as the mill of the Eureka Mining Company of Utah, situate at the town of Homansville, in county of Utah, Territory of Utah.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as equity, of the said defendant, The Eureka Mining Company of Utah, in and to the premises and the property and every part thereof, with the appurtenances.

That the said conveyance was nevertheless upon the conditions that if the said Eureka Mining Company of Utah should pay or cause to be paid the said sum of money secured to be paid by the said promissory note, with the interest as stipulated therein, then

the estate thereby granted should cease and determine; but if default should be made in the payment of the said sum of money or any part thereof as provided in said promissory note, then the
470 said Tracy, his representative or assigns, were authorized to enter upon the said mortgaged premises and to sell and dispose of the same and all equity of redemption of the said Eureka Mining Company of Utah, its successors and assigns, according to law, and out of the money arising from such sale to retain the principal and interest then due on said promissory note, with the costs and charges of foreclosure, and also a percentage at the rate of five per cent. upon the judgment recovered or amount found due plaintiff on said note and mortgage as counsel fees and commissions, and also the amount of any taxes, insurance assessments, or incumbrances on said premises or said mortgages or the money secured thereby which may have been paid by the said Tracy, his representatives or assigns, with interest thereon at the rate of twenty per cent. per annum.

Plaintiff alleges that the said mortgage was duly acknowledged by the said mortgagor, and on the 5th day of August, 1873, the same was duly recorded in the office of the county recorder of said Juab county, and on the 29th day of May, 1874, said mortgage was duly recorded in the office of the county recorder of said Utah county, A copy of said mortgage, with the endorsements thereon, is hereto annexed, marked Exhibit "A," and made a part of this complaint.

That the said Theodore F. Tracy has duly assigned and transferred the said mortgage to this plaintiff, who is now the holder and owner thereof, and plaintiff alleges that the defendant the said Eureka Mining Company of Utah has failed to comply with the conditions and covenants in said mortgage contained
471 and has failed to pay any part of the principal or interest due on said promissory note, and that the sum of forty-three thousand five hundred and eighty-seven and $\frac{50}{100}$ dollars ($43,587.50), with interest thereon from the 15th day of September, 1872, at the rate of twenty per cent. per annum, is now due and owing from the said Eureka Mining Company of Utah to this plaintiff.

Plaintiff alleges that the defendant Wells, Fargo and Company has or claims to have some interest or claim upon said premises or some part thereof, which interest or claim the plaintiff alleges is subsequent to and subject to the lien of plaintiff's said mortgage.

Wherefore the plaintiff prays judgment against the said defendant, The Eureka Mining Company of Utah:

1. For the sum of forty-three thousand five hundred and eighty-seven and $\frac{50}{100}$ dollars ($43,587.50), with interest thereon, at the rate of twenty per cent. per annum, from the 15th day of September, 1872, and that the same may bear interest at the like rate after judgment until paid.

And also in a further sum equal to five per cent. on the amount of said principal and interest as stipulated in said mortgage, together with the costs of this action.

2. That the said mortgaged premises and property or so much thereof as may be necessary be decreed to be sold by the United States marshal or sheriff of the proper county according to law and the practice of this court; that the proceeds of said sale may be applied to the payment of the costs of this action and the expenses of said sale, and then to the amount due to the plaintiff for
472 principal and interest to the time of said payment and to the amount found due to the plaintiff for counsel fees and commissions, and that the said defendants and each of them and all persons claiming under them or either of them subsequent to the execution of said mortgage, either as purchasers, incumbrancers, or otherwise, may be debarred and foreclosed of all right, claim, and equity of redemption in the said premises and every part thereof, and if said proceeds of sale prove insufficient to satisfy said indebtedness and a balance remain due to plaintiff that the amount thereof may be docketed, and that plaintiff may have execution therefor against the defendant The Eureka Mining Company of Utah.

3. That the plaintiff or any other party to this cause may become purchasers at said sale; that the officer making said sale execute a deed to the purchaser; that said purchaser be let into possession of the premises on production of such deed therefor, and that the plaintiff may have such other or further relief in the premises as to the court may seem meet, equitable, and just.

HEMPSTEAD AND KIRKPATRICK,
Attorneys for Plaintiff.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Joab Lawrence, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled cause; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to
473 those matters he believes it to be true.

[SEAL.] JOAB LAWRENCE.

Subscribed and sworn to before me this 26th day of August, 1874.

JOS. F. NOUNAN,
Clerk Third District Court of Utah Territory.

EXHIBIT "A."

This indenture made this ninth day of November, 1872, between the Eureka Mining Company of Utah, a corporation under and by virtue of the laws of Utah Territory, party of the first part, and Theodore F. Tracy, trustee, of the city of Salt Lake and Territory of Utah, party of the second part, witnesseth: Whereas, the said party of the first part is justly indebted to the said party of the second part in the sum of forty-three thousand five hundred and

eighty-seven and $\frac{50}{100}$ dollars, lawful money of the United States of America, secured to be paid by a certain promissory note, bearing date September 15th, 1872, and which note is in the words and figures following, to wit:

"Office of Eureka Mining Company of Utah.

"Joab Lawrence, president; John N. Whitney, vice-president; William H. Wood, secretary and treasurer.

"$43,587.50. SALT LAKE CITY, *September 15th*, 1872.

"Six months after date, for value received, the Eureka Mining Company of Utah promises to pay to the order of Theodore F. Tracy, trustee, forty-three thousand five hundred and
474 eighty-seven dollars and $\frac{50}{100}$ dollars, negotiable and payable at the banking-house of Wells, Fargo and Company in Salt Lake City, without defalcation and discount, with interest at the rate of twenty per cent. per annum from date until paid, both before and after judgment.

"THE EUREKA MINING COMPANY OF UTAH,

"[SEAL.] By JOAB LAWRENCE, *President.*"

Now, this indenture witnesseth, that the party of the first part, for the better securing the payment of the said sum of money secured to be paid by the said promissory note, with interest thereon according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to it in hand paid by the said party of the second part, at or before the sealing or delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs, and assigns forever, all that certain mining property, lode, lead or deposit of mineral, situate, lying and being at Eureka hill, near Eureka City, Tintic mining district, Juab county, Utah Territory, consisting in part of the following lodes, to wit: the Eureka lode, the Eureka Twin lode, the Left Bower lode, the Young Lion lode, and the Mountain lode, with the works, shafts, tunnels, ores, lead and silver and gold bearing rock on the dumps of said mines, and the tools, material, machinery at and used about said mines; also the buildings, lots, offices, and properties,
475 both personal and real, belonging to said company, situate, in the said town of Eureka, county and Territory aforesaid; also all that certain quartz mill, with the machinery tools, material, etc., together with the ground attached thereto, belonging to said company, situate at the town of Homansville, county and Territory aforesaid; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining and the rents, issues and profits, thereof, and also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first

part of in and to the said premises, and every part and parcel thereof with the appurtenances unto the said party of the second part, his heirs and assigns forever.

Provided always and these presents are upon the express condition that if the said party of the first part, its successors or assigns shall well and truly pay or cause to be paid to the said party of the second part, his executors, administrators, or assigns, the said sum of money secured to be paid by the said promissory note and the interest thereon, at the time and in the manner mentioned in the said promissory note according to the true intent and meaning thereof, then and in that case these presents and the estate hereby granted shall cease, determine and be void. And the said party of the first part for itself and its assigns and successors hereby covenants, promises and agrees to pay to the said second party, his executors, administrators, or assigns, the said sum of money and the interest as mentioned in said promissory note and secured to be paid as
476 aforesaid.

And if default shall be made in the payment of the said sum of money, or any part thereof, as provided in said note, then and from thenceforth it shall be optional with the said party of the second part, his executors, administrators, or assigns to immediately enter into and upon all and singular the premises hereby granted or intended so to be, and sell and dispose of the same, and all benefit and equity of redemption of the said party of the first part, its successors or assigns, according to law, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said promissory note, together with the costs and charges of foreclosure, suit, and also a percentage at the rate of five per cent. upon the amount of judgment recovered or in case the said foreclosure suit is settled before judgment recovered upon the amount found due to plaintiff on said note and mortgage as counsel fees and commissions and also the amount of all such payment of taxes, assessments or incumbrances as may have been made by the said party of the second part, his heirs, administrators, or assigns, by the reason of the permission hereinafter given, with his interest on the same hereinafter allowed, rendering the surplus of the purchase-money (if any there shall be) unto the said party of the first part, his heirs, executors, administrators, or assigns.

And the said party of the first part does hereby further covenant, promise and agree to and with the said party of the second part to pay and discharge at maturity all such taxes or assessments,
477 liens or other incumbrances now subsisting or hereafter to be laid or imposed upon said premises or upon the mortgage or the money secured thereby, or which may be in effect a prior charge thereupon to these presents, during the continuance thereof, and in default thereof the said party of the second part may pay and discharge the same and may at his option keep fully insured against all risks by fire the buildings, which are now or may be hereafter erected thereon, at the expense of the party of the first part, and the sum so paid shall be repayable in that same kind of money in which the same may have been paid, and shall bear in-

terest at the rate of twenty per cent. per annum, and shall be considered as secured by these presents and be a lien upon said premises and shall be deducted from the proceeds of the sale hereof, above mentioned with interest as herein provided.

In witness whereof, the said party of the first part has by a resolution of the board of directors adopted November 9th, A. D. 1872, caused its signature or name to be hereto subscribed by its president, Joab Lawrence, an- its seal to — hereto annexed by its secretary this 9th day of November, A. D. 1872.

[Corporate Seal.]

THE EUREKA MINING COMPANY
OF UTAH,
By JOAB LAWRENCE, *Its President.*

Attest: W. H. WOOD, *Secretary.*

Witness:
THOS. MARSHALL.
WM. S. WALKER.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On this 10th day of January, 1873, before me, William S. Walker, clerk of the third judicial district court of the Ter-
478 ritory of Utah, personally appeared the within-named Joab Lawrence, president of the Eureka Mining Company of Utah, and William H. Wood, secretary thereof, whose names are subscribed to the annexed instrument in capacity aforesaid and who have subscribed thereto the name of said corporation and attached the seal thereof to the same, who are personally known to me to be the same parties, and they and each of them acknowledged the same as for the act and signature of said corporation.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Salt Lake City, the day and year in this certificate first above written.

[L. S.] W. S. WALKER,
Clerk Third Judicial District Court of Utah Territory.

Filed for record August 4th, 1873, at 15 minutes past 9 a. m. Recorded August 5th, 1873, at 30 minutes past 2 p. m., in Book W, pages 453, 456.

JOHN PYPER,
County Recorder.

Filed and recorded May 29th, 1874, at 11 a. m., Book E, pages 398, 399, 400, and 401.

L. JOHN NUTTAL,
Utah County Recorder.

Endorsed: First district court. Joab Lawrence *vs.* Eureka Mining Company of Utah and Wells, Fargo and Company. Complaint. Filed August 28th, 1874. Charles W. Emerson, clerk. Exhibit No. 3.

479 EUREKA EXHIBIT No. 4.

In the District Court of the First Judicial District of the Territory of Utah, Utah County.

JOAB LAWRENCE
vs.
THE EUREKA MINING CO. OF UTAH and WELLS, FARGO AND COMPANY.

And now comes the said defendant, The Eureka Mining Company of Utah, and for answer to the complaint of the plaintiff in the above-entitled suit, denies that on the 15th day of September, 1872, or at any other time, the said defendant made or executed or delivered to Theodore F. Tracy, trustee, its certain promissory note as alleged in the complaint or otherwise, or that it thereby or otherwise promised to pay said Tracy, trustee, the sum of $43,857.50 or any other sum or any interest or any sum whatever at any rate per annum or otherwise, or that it ever at any time made, executed, or delivered the promissory note set out in the complaint.

And said defendant denies that to secure the payment of the promissory note set out in the complaint or for any other purpose it executed or delivered to said Tracy, trustee, the mortgage set out in the complaint, or that it ever at any time executed a mortgage to secure any sum of money alleged or pretended to be due said Tracy, as trustee, or otherwise or to the plaintiff, or that it ever conveyed the property described in the debt, or upon any conditions or otherwise, or that the said alleged mortgage was ever acknowledged by this defendant.

480 Second. And for a further and separate defense to said suit this defendant alleges that it is a corporation formed and existing under the laws of Utah Territory, whose business is to carry on and conduct the business of mining, milling, smelting, and working ores in said Utah Territory through the intervention of a board of trustees.

And this defendant alleges and charges that the said plaintiff had no authority to execute the promissory note set out in the complaint in the name or on behalf of this defendant, and that the pretended indebtedness for which the same was given was not a just and lawful indebtedness of this defendant, and that the money represented thereby was not raised or expended in or about the business of this defendant, and that no authority is given by the instrument constituting this defendant a corporation, or by its by-laws or otherwise, to its board of trustees or any other officer or officers of this defendant to make or execute the pretended promissory note or mortgage set out in the complaint.

Third. And further answering, and as a separate defense and as a ground for affirmative relief against said plaintiff, this defendant avers that it is a corporation incorporated under the laws of Utah Territory in the month of May, 1871, with a capital stock of five

hundred thousand dollars, divided into five thousand shares of one hundred dollars each, for the purpose of carrying on the business of mining, milling, smelting, and working ores in said Territory, and particularly in connection with certain mines on Eureka
481 hill, in Tintic mining district, in Juab county, in said Territory.

That the plaintiff, at the first meeting of the stockholders, was elected as a trustee and president of the board of trustees of said corporation, and continued to act in those capacities *de facto* until after the ninth day of November, 1872, and as such trustee and president of the board of trustees was bound to exercise his utmost skill and care, and to act with the strictest good faith towards the property of said corporation, and to advance the best interests of the holders of shares of the capital stock thereof; that said plaintiff was, up to, on, or about the 7th day of October, 1872, the largest shareholder in said corporation, owning not less than 1,750 shares at any one time, and on said 7th day of October, 1872, owning, as this defendant is informed and believed, in his own name and in the name of C. B. Trowbridge and others, upwards of two thousand shares of its capital stock; that during the same time one John N. Whitney acte- as one of the trustees and the vice-president of said corporation, and one William H. Wood acted as one of said trustees and nominally held the office of secretary and treasurer of said corporation, said Whitney and Wood being also very large owners of shares of the capital stock thereof.

That while said Wood was nominally the secretary and treasurer of said corporation the records of the corporate meetings and the accounts were kept by and nearly all are in the handwriting of the plaintiff, said Wood merely attesting the same by his signature when thereto requested by the plaintiff.

That this defendant is informed and believes and charges the fact to be that said plaintiff and said Whitney and Wood, some
482 time previous to the summer of 1872, but at what precise time it cannot state, unmindful of their duty to this defendant in their official and fiduciary capacity aforesaid and to the shareholders of the defendant, entered into a corrupt and fraudulent agreement and conspiracy, first, to create by false and fraudulent means an untrue and inflated opinion in the minds of the public of the value of the property of this defendant, so that they might sell or exchange and dispose of a large portion of the shares of the stock owned by them at a price beyond their real value and then create a large indebtedness against the defendant, for which the said conspirators would cause a mortgage to be given on all the property of the defendant sufficient to enable the plaintiff to buy back all of said property on a foreclosure of said mortgage while the value of the property should be in the depressed condition naturally following the discovery of its true value and the knowledge of the pretended indebtedness hanging over it; that this conspiracy was aimed not only against certain persons who subsequently became and still are shareholders of the defendant, but also against this defendant itself, being directed in part to the acquisition of the

property of the defendant discharged of all right and title of the defendant therein held in trust for the benefit of its shareholders.

That, in execution of the above-declared fraudulent conspiracy, the said plaintiff, Whitney, and Wood, previous to the 7th day of October, 1872, caused to be placed in the mines owned by the defendant valuable silver ore, culled from the said mines or purchased elsewhere, in such manner as to produce a false impression
483 that the said rich ores disclosed in said mines where there found in place as the natural product of said mines, whereas in truth and in fact said ores were not produced and found in the places where they were to be seen, but had been fraudulently placed there for the purpose aforesaid, and also caused other and superior silver ore, culled as aforesaid or brought from other mines, to be placed on the ore dumps of the defendant's mines in such manner as falsely and fraudulently to create the impression in the minds of persons examining the same that the said ores were produced in the condition in which they were displayed from the mines of the defendant, whereas in truth and in fact the said ores were not produced in their then condition from the mines of the defendant, and the said rich ores did not correctly represent the character and value of the ores produced from the said mines or of the ore dumps of said mines, all of which the plaintiff and his co-conspirators well knew.

And defendant alleges that, in further execution of said fraudulent combination and conspiracy, plaintiff and said Whitney and Wood procured and caused the samples of ore selected by persons sent to examine said properties with a view to purchasing an interest therein to be changed and ores of richer and superior quality to said samples to be substituted in place thereof, so that the samples selected by the experts and persons sent to examine said property did not truly represent the character and quality of the ores produced by said mines, as the plaintiff and his co-conspirators well knew.

484 That by reason of the fraudulent and covinous acts and doings aforesaid, carried on by the plaintiff and his co-conspirators for the purpose of creating a false impression of the value of the defendant's mines and to enable them to dispose of a large proportion of their shares in said corporation at a price far above its real value, the plaintiff procured to be sold and induced a large number of persons to purchase shares of the defendant's stock exceeding one-half of the total amount of the capital stock of said company, to wit, upwards of twenty-five hundred shares thereof, which persons have ever since been and still are holders of the shares so purchased by them, and are, among others, the persons for whose benefit the defendant hold- said properties and whose rights it is bound to protect.

And the defendant alleges that on or about the 7th day of October, A. D. 1872, the plaintiff sold and transferred to one Eber B. Ward, who had been deceived and misled by the plaintiff by the corrupt and covinous practices aforesaid, two thousand shares of the capital stock of the said company, equal to an undivided two-fifths

interest therein, and received in exchange therefor from the said Ward property of the value of two hundred thousand dollars or upwards, which said property so received as the consideration of said sale the plaintiff well knew to be largely in excess of the value of the two-fifths undivided interest transferred to said Ward, and also well knew that the said Ward had been induced to purchase the same and pay a large and exorbitant price therefor through the false, fraudulent, and covinous acts and representations aforesaid of the said plaintiff and his co-conspirators.

That said sale was made and concluded and the papers witnessing the same were signed at the city of Detroit, in the State of Michigan; that said Ward since then has been and now is the largest shareholder of this defendant.

That immediately after the consummation of said sale and in further execution of the fraudulent conspiracy aforesaid, to wit, on the 4th day of November, 1872, and two days after the transfer on the books of the defendant of said interest of two thousand shares of the capital stock of the said company to said Ward, it appears from the records of defendant that a meeting of the board of directors of the said defendant was held, at which plaintiff and said Whitney and Wood, being a majority of the board of trustees of defendant, pretended to pass a resolution approving the pretended payment of the following sums of money in words following:

"The treasurer, W. H. Wood, presented the following vouchers for disbursements since May 6th, 1872:

For salary account,		Joab Lawrence	$9,000 00
"		W. H. Wood	5,500 00
"		John N. Whitney	5,500 00
	Expense account, law:		
		Joab Lawrence	4,080 00
		Whitney, Richards and H.	4,800 00
		Joab Lawrence	2,200 00
		Joab Lawrence	31 00
		Joab Lawrence	34 65
For		John N. Whitney	283 75
		Joab Lawrence	800 00

Upon motion of James F. Woodman, which was concurred — by all present, the vouchers were approved and ordered paid. On motion of Joab Lawrence the meeting adjourned to meet on Saturday, the 9th instant."

The minutes of this pretended meeting are in the handwriting of the plaintiff and not in the handwriting of the secretary of the defendant.

And this defendant alleges that the said pretended claims and vouchers for salary had not been paid at the time of the holding of said meeting by said secretary or any other person; that they had never been audited or allowed by the board of trustees of said company, and that the allowance of the same was contrary to and in direct violation of the by-laws of said company, which provide in

article twelve that "the board of trustees shall receive no salary or other emolument than such reimbursement for time and expenses incurred while actively engaged in the service of the company and which service and compensation therefor shall be determined and audited by the board of trustees."

And was further a fraudulent device conco-ted by the plaintiff to create a fictitious debt against this defendant, and that said several sums were never audited or allowed, nor did they in any manner become nor are they now just and lawful debts of this defendant, and that the same is true of the items charged under "expense account," as above stated, all of which plaintiff well knew; and,
487 further, on information and belief, this defendant avers and charges that all the items aforesaid are owned and claimed by the plaintiff.

And this defendant further charges that the said several claims would not have been made but for the fraudulent sale of by far the greater part of the interest of the plaintiff and said Whitney and Wood in the shares and property of this defendant, and that the pretended approval of the pretended payment was fraudulent and void and in no manner binding upon the defendant; and, furthermore, that in fact the said record is false, as no vouchers for said pretended charges above mentioned were presented or in fact existed at the time of the holding of said meeting.

Defendant further shows that on Saturday, Nov. 9th, A. D. 1872, the said Lawrence, Whitney, and Wood pretended to hold another meeting of the board of trustees of the defendant, the minutes of which are also in the handwriting of the plaintiff, except the signature of "W. H. Wood, sec'y," at the end, and are in the words and figures following, so far as the same in any manner relate to the subject-matter of this suit or the defence thereto set up herein, to wit:

OFFICE OF EUREKA MINING COMPANY,
SATURDAY, *Nov. 9th*, 1872.

At the adjourned meeting of the trustees of the Eureka Mining Company of Utah, held at the company's office this day, there was present James F. Woodman, W. H. Wood, C. B. Trowbridge, Joab Lawrence.

Absent: Thomas Taylor and Geo. Cupman.

The president, Joab Lawrence, proceeded to explain the condition of affairs.

488 Whereas this company is now indebted to Joab Lawrence in one hundred and fifty shares of the capital stock of this company, loaned by him to it for the purpose of compromising the suit of Barston and others;

Whereas this company is the owner of forty-eight shares of stock therein now standing on the books of the company in the name of Whitney, Richards and Hastings: Now, therefore, it is—

Resolved, first, That said forty-eight shares be transferred to the said Joab Lawrence as part payment of said one hundred and fifty shares due and owing him, and that the secretary is hereby instructed to see that such transfer is duly made.

Second. That the company pay to the said Lawrence the sum of $4,080.00, being at the rate of forty dollars per share, in full discharge of said one hundred and fifty shares so due and owing to him, the said Joab Lawrence.

* * * * * * *

Whereas this corporation was, on August 22nd, A. D. 1872, indebted to Joab Lawrence for money advanced up to date in the sum of twenty-three thousand five hundred and eighty-seven and $\frac{51}{100}$ dollars and on November 7th, A. D. 1872, in the further sum of twenty thousand dollars by him at that date loaned and advanced to this company, which sum, aggregating the sum of $43,857.50, is justly due and owing him, the same Lawrence: Now, for the purpose of securing the same and equalizing the just interest therein, it is—

Resolved, That the president is hereby authorized and directed to make, execute, and deliver to Theodore F. Tracy, trustee, a
489 negotiable promissory note in the name and in behalf of the company for said sum of $43,857.50, the said note drawn payable to the order of said Theodore F. Tracy, trustee, to be dated September 15th, 1872, and to bear interest at the rate of twenty per cent. per annum, payable in six months after the date thereof, and for the securing the payment thereof to make, execute, sign, seal, and deliver a good and sufficient mortgage on the mining property and real estate, quartz mill, and machiney of this company situate, lying, and being in Tictic mining district, Juab county, Utah Territory, and the said Joab Lawrence is hereby authorized to sign the same in the name of and in behalf of this company for the purpose aforesaid, and the secretary of this corporation is hereby directed to attach thereto the seal of said corporation and to attest the same.

The said note and mortgage aforesaid being given, made, and executed in discharge and payment of the said debt to the said Joab Lawrence.

* * * * * * *

W. H. WOOD, *Secretary.*

And this defendant further shows and alleges that the foregoing minutes constitute the only authorization for the giving of the note and mortgage set forth at large in the complaint herein — were made in pretended execution of the pretended authority conferred by the foregoing extract from the minutes of the proceedings of the board of trustees and not otherwise, and this defendant thereupon avers that it does not appear from said minutes that said pretended
490 resolutions were ever offered by any members of the board of trustees or were voted for by any members of the board of trustees or were ever passed or voted upon, and on information and belief the defendant avers that the said resolutions were written in said book of minutes by the plaintiff before said ninth day of November, 1872, and the same were never in fact passed by any legally constituted meeting of the said board of trustees, and that if the same had been actually voted upon were beyond the authority of

said board to pass, and conferred no authority on the plaintiff to make a note and mortgage to a trustee for plaintiff, the then *de facto* president of the defendant, for an indebtedness which never existed and could never have existed under the by-laws of this defendant, and that in fact the entry of the same by the plaintiff was intended to be and was fraudulent act for the purpose of carrying out the corrupt and covinous conspiracy aforesaid, and that the whole thereof and the pretended promissory note and mortgage made by virtue thereof are each and every void and of no effect and virtue whatever to create any indebtedness or liability of any nature against this defendant.

Wherefore this defendant prays:

First. That the plaintiff take nothing by his said suit.

Second. That it be decreed by this court that said promissory note and mortgage set out in this complaint are void and fraudulent and confer no rights as against this defendant or against the property of defendants described in said mortgage, and that said mortgage be by the direction of the court cancelled on the records of the county where the same is recorded.

491 Third. That this defendant have judgment for its costs in this behalf expended.

BENNETT & WHITNEY,
Attorneys for The Eureka Mining Company of Utah, One of the Defendants.

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

Paul A. Schettler, being duly sworn, deposes that he is the vice-president and acting president of the defendant The Eureka Mining Company of Utah; that he has become informed of the matters set forth in the foregoing answer by an inspection of the records of the defendant and by conversation with the former employees and others interested in the defendant and partially by his own personal knowledge of the matter therein set up; that he has heard the foregoing answer, read and knows its contents; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

PAUL A. SCHETTLER.

Subscribed and sworn to this 9th day of October, A. D. 1874, before me—

[SEAL.] JAMES N. KIMBALL,
Notary Public.

Endorsed: Exhibit No. 4. First district court *court.* Joab Lawrence *vs.* Eureka Mining Company of Utah and Wells, Fargo and Company. Answer. Served this 9th day of October, 1874. Hempstead and Kirkpatrick, attorneys for plaintiff. Filed this 10th day of October, 1874. C. W. Emerson, clerk. Bennett and Whitney, attorneys for defendant Eureka Mining Company.

492 EUREKA EXHIBIT No. 5.

In the District Court of the First Judicial District in and for the Territory of Utah.

JOAB LAWRENCE
vs.
THE EUREKA MINING COMPANY OF UTAH, WELLS, FARGO AND COMPANY, and EUREKA HILL MINING COMPANY.

Answer.

And now comes the Eureka Hill Mining Company, and, by leave of the court first had and obtained, for answer to the complaint of the plaintiff in this action—

First. On information and belief denies that on the 15th day of September, 1872, or at any time the said defendant, The Eureka Mining Company of Utah, made, executed, or delivered to Theodore F. Tracy, trustee, its certain promissory note, as alleged in the complaint, or that it thereby or otherwise promised to pay said Tracy, trustee, the sum of $43,857.50 or any other sum or any interest on any sum whatever at any rate per annum or otherwise, or that it ever at any time made, executed, or delivered the promissory note set out in the complaint; and said defendant, The Eureka Hill Mining Company, upon information and belief denies
493 that to secure the payment of the promissory note set out in the complaint or for any other purpose the defendant The Eureka Mining Company of Utah executed or delivered to said Tracy, trustee, the mortgage set out in said complaint or ever at any time executed a mortgage to secure the payment of money alleged or pretended to be due said Tracy, as trustee or otherwise, or to the plaintiff, or that it ever conveyed the property described in the complaint or any part thereof to any person as security for such debt or upon any condition or otherwise, or that the said alleged mortgage was ever acknowledged by the defendant The Eureka Mining Company of Utah.

Second. The defendant alleges that the Eureka Mining Company of Utah is and ever since a date prior to the 15th day of September, 1872, has been a mining corporation or company organized and existing under the laws of Utah Territory, with the object and purpose of carrying on and conducting the business of mining, milling, and reducing ores.

That on the 15th day of September, 1872, Joab Lawrence, the plaintiff herein, was a stockholder, trustee, and the president of said defendant, The Eureka Mining Company of Utah, and so remained until on or about the 9th day of November, 1872; that while acting as such said plaintiff presented and made claim against said Eureka Mining Company of Utah for a large sum of money, to wit, about the sum of $43,857.50, and on or about the 7th day of November, 1872, caused the trustees of said company to audit and

allow his claim and in form authorize said plaintiff, acting as president of said company, and one William H. Woods, then acting as secretary thereof, in the name of said company, to make, execute, and deliver the note and a mortgage of said company upon the property described in the complaint in this action made to Theodore F. Tracy, trustee, but for the sole use and benefit of the plaintiff.

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This defendant further alleges upon information and belief that said trustees of said Eureka Mining Company of Utah had no power or authority whatever to make, either to allow said claim or to authorize the making of said note and mortgage, and that the said company was not indebted to the plaintiff in the said sum nor in any like amount nor in any sum whatever.

This defendant further alleges that the Eureka Hill Mining Company is and since the 15th day of November, 1875, has been the owner and in possession of those certain mining claims and property, situate in the Tintic mining district, in Juab county, in said Territory of Utah, on Eureka hill, described as follows, to wit, the Eureka lode, the Montana lode, the Young Lion lode, the Deseret lode, the Left Bower lode, and the buildings, lots, offices, etc., all described in the complaint in the above-entitled action.

That said company, the Eureka Hill Mining Company, succeeded to all the right, title, and interest in said property formerly owned by the "Eureka Mining Company of Utah" and "Wells-Fargo & Company."

Wherefore this defendant demands judgment that said plaintiff take nothing by this action and for costs.

C. W. BENNETT,
Att'y for Eureka Hill Mining Company.

495 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

William W. Chisholm, being first duly sworn, deposes and says that he is the secretary of The Eureka Hill Mining Company, one of the defendants in the above-entitled action, duly authorized to make this affidavit of verification; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

W. W. CHISHOLM.

Subscribed and sworn to before me this 22nd day of May, 1886.
W. P. McBRIDE, *Clerk,*
By W. S. JENKS,
Deputy Clerk.

Endorsed: Exhibit No. 5. First district court. Joab Lawrence *vs.* Eureka Mining Company of Utah *et al.* Answer of Eureka Hill Mining Company. C. W. Bennett, attorney for defendant, Eureka Hill Mining Company.

496 EXHIBIT No. 6.

In the District Court of the First Judicial District, Territory of Utah.

JOAB LAWRENCE
vs.
THE EUREKA HILL MINING CO. *et al.* } Foreclosure.

The above-entitled cause came on regularly for hearing and trial before the court in chancery and without a jury, Messrs. Hempstead and Gamble appearing for the plaintiff and C. W. Bennett, Esq., appearing for the defendant The Eureka Hill Mining Company, the other defendants not appearing. Wherefore testimony was offered on the part of the plaintiff and submitted upon the part of the defendant, appearing without further testimony.

Whereupon the case was submitted to the court without oral argument, and the court finds the following facts in the case:

That the indebtedness for which note and mortgage were given arose out of advances made by the plaintiff to the defendant The Eureka Mining Company of Utah, the mortgagor; that at the time the advances were made the plaintiff was president of the said defendant corporation; that the said defendant was then in embarrassed circumstances, and that these advances were made by the plaintiff to relieve it from such embarrassment, and were made with the knowledge and consent and by the procurement of the board of directors of the said defendant, The Eureka Mining Company of Utah, of which board the plaintiff was president.

That the note and mortgage were executed and delivered to secure the plaintiff for said advances made by him, and were ex-
497 ecuted and delivered in accordance with a resolution of the board of directors of the defendant corporation directing and authorizing it to be done; that the action of the board of directors in this regard was submitted to the stockholders at their next annual meeting, and said action was by them ratified and confirmed; that no part of said mortgage debt has been paid, and that the whole amount is now due; that the amount now due and so found as principal and interest is seventy-seven thousand two hundred and ninety-three and $\frac{71}{100}$ dollars ($77,293.71), beside costs and commissions as provided in said mortgage.

That the other defendants named, aside from the Eureka Mining Company of Utah, are subsequent incumberers.

As a conclusion of law from the above facts the court finds—

That the plaintiff is entitled to recover from the said Eureka Mining Company of Utah the sum of seventy-seven thousand two hundred and ninety-three and $\frac{71}{100}$ dollars ($77,293.71) and costs and commissions, as provided in said mortgage, and, in default of the payment thereof, to a decree and an order of sale of the said mort-

gaged premises, and the court directs a decree to be issued accordingly.

PHILIP H. EMERSON,
Judge First District Court.

Dated January 27th, 1876.

Endorsed: Exhibit No. 6. District court, first judicial district. Joab Lawrence *vs.* Eureka Mining Company *et al.* Foreclosure. Filed July 27th, 1876. Chas. W. Emerson, clerk, by John McEwan, deputy.

498 EUREKA EXHIBIT No. 7.

In the District Court for the First Judicial District of the Territory of Utah.

JOAB LAWRENCE, Plaintiff,
vs.
THE EUREKA MINING COMPANY OF UTAH and THE EUREKA HILL MINING COMPANY, Defendants.

This cause having this — been brought on to be heard upon the complaint filed therein and upon the answer filed thereto by the Eureka Mining Company of Utah and by the Eureka Hill Mining Company, and due proof having been made after the filing and recording of the mortgage in said complaint set up in the offices of the recorders of Juab and Utah counties, in which counties the property affected by said mortgage is situated, and the court having heard the proofs necessary to enable it to render judgment herein, and it appearing to the court from said proofs that there is now due to the plaintiff from said Eureka Mining Company of Utah for principal and interest upon the debt and mortgage set out in said complaint the sum of seventy-seven thousand two hundred and ninety-three and $\frac{71}{100}$ — ($77,293.71), lawful money of the United States of America, which sum is to draw and bear interest
499 from date hereof at the rate of twenty per cent. per annum, payable in like lawful money, and that all the allegations in said complaint are true:

Now, on motion of Messrs. Hempstead and Gamble, counsel for plaintiff, it is adjudged and decreed that all and singular mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and costs in the suit and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the United States marshal for the Territory of Utah.

That the said marshal shall give public notice of the time and place of such sale according to the course and practice of the court and the laws relative to sales of real estate under execution, and that the plaintiff or any of the parties to this suit may become the

purchaser at such sale, and that said marshal, after the time allowed by law for redemption has expired, execute a deed or deeds to the purchaser or purchasers of the mortgaged premises on the said sale.

That the marshal, out of the proceeds of such sales, retain his fees, commissions, and disbursements on said sale and pay to the plaintiff or his attorneys out of said proceeds his costs in this suit, taxed at — dollars, and the sum of three thousand eight hundred and sixty-two dollars, fixed by said mortgage and allowed by the court as counsel — of foreclosure, with interest thereon at the rate of twenty per cent. per annum from the date of this decree, and
500 also the amount so found due as aforesaid, with interest thereon at the rate of twenty per cent. per annum from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

That the defendants and all persons claiming or to claim from or under them or either of them, and all persons having liens subsequent to said mortgage by judgment and his, her, or theirs *or their* personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to said mortgage and the due record thereof or subsequent to *said mortgage and the due record thereof or subsequent to* the filing of a notice of the pending of this action in the office of the recorder or recorders of the county or counties where such property is situated, be forever barred and foreclosed of and from all equity or redemption and claim of, in, or to said mortgaged premises and every part and parcel thereof from and after the delivery of the said marshal's deed.

And it is further adjudged and decreed that if the moneys arising from the said sales shall be insufficient to pay the amount so found due to the plaintiff as hereinbefore stated, with the interest and costs and attorneys' fee of foreclosure and expenses of sale as aforesaid, said marshal specify the amount of such deficiency and balance due to the plaintiff in his return, and that on the coming in of said return judgment of this court shall be docketed
501 against the defendant The Eureka Mining Company of Utah, and that The Eureka Mining Company of Utah, defendant, which is personally liable for the payment of the debt secured by the said mortgage, pay to the plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of twenty per cent. per annum from the date of said last-mentioned return and judgment, and that plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the complaint filed in this action, — as follows, to wit, all and singular the mining properties, lodes, mines, leads, or deposits which belonged to the said Eureka Mining Company of Utah on the 15th day of September, 1872, Eureka City, in Juab county, Ter-

ritory of Utah, described as follows, to wit, "the Eureka lode," a vein or deposit of silver-bearing rock, and the land and premises adjacent thereto, embracing twenty-two hundred linear feet of said lode, to wit, one thousand feet extending southerly from the discovery stake thereon and twelve hundred feet extending northerly from said discovery stake on the northern extension of said Eureka lode, the said lode being more particularly described in the United States patent therefor issued to the said Eureka Mining Company of Utah and now on record in the office of the recorder of said Juab county, and to which reference is hereby made.

Also the Montana lode, a vein or deposit of silver-bearing rock, and the land and premises adjacent thereto, embracing twenty-two hundred linear feet on and along said lode, being twelve hundred (1,200) feet *feet* of the Montana discovery location
502 and one thousand feet of the Montana norther- extension, more particularly described in the United States patent therefor issued to said Eureka Mining Company and now of record in the office of the recorder of Juab county, and to which reference is hereby made.

Also the "Eureka Twin lode," a vein or deposit of silver-bearing rock, and the land and premises appurtenant thereto, embracing two thousand linear feet of, along, and upon said lode, being twelve hundred feet northerly and eight hundred feet southerly from the discovery stake thereof, together with a space of one hundred feet in width on each side thereof extending throughout said claim.

Also the Young Lion lode, a vein or deposit of silver-bearing rock, and the land and premises adjacent thereto, embracing two thousand two hundred linear feet of an- upon said lode, being one thousand feet of Young Lion discovery location and one thousand feet Young Lion northern extension and two hundred feet Young Lion southern extension, together with a space one hundred feet in width on each side of said lode extending throughout the entire claim.

Also the Left Bower, a vein or deposit of silver-bearing rock, and the land and premises adjacent and appurtenant thereto, embracing six hundred linear feet of and upon said lode, extending southerly from the discovery stake thereon, with a space one hundred feet in width on each side thereof extending throughout said claim.

Also the Deseret lode, a vein or deposit of silver-bearing
503 rock, and the land and premises adjacent or appurtenant thereto, embracing two thousand two hundred linear feet of and upon said lode, being one thousand feet of Deseret discovery location and one thousand feet of Deseret northern extension and two hundred feet of Deseret southern extension.

Also all and singular the works, shafts, and tunnels of said mines, and the tools and machinery at and used in connection therewith by said Eureka Mining Company of Utah.

Also the buildings, lots, offices, and other real estate used in connection with said mines or the workings thereof by said Eureka Mining Company of Utah.

And also all that certain quartz mill, with the machinery tools, material, and the land appurtenant thereto, belonging to said Eureka Mining Company of Utah and known as the mill of the Eureka Mining Company of Utah, situate at the town of Homansville, in the county of Utah, Territory of Utah, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and any and all right, title, or interest acquired by said Eureka Mining Company of Utah in or to said property and premises, and any and every part or parcel thereof since said 15th day of September, 1872.

P. H. EMERSON,
Judge First District Court.

Dated July 27th, 1876.

Endorsed: Exhibit No. 7.

504 EUREKA EXHIBIT No. 8.

I, William Nelson, United States marshal for the Territory of Utah, do hereby certify that by virtue and in pursuance of the annexed judgment and decree I advertised the property described in said judgment as follows, to wit:

All the right, title, and interest which the Eureka Mining Company of Utah had on the 15th day of September, 1872, or have since acquired in or to the following lodes, mines, mining claims, and veins of mineral-bearing rock situate on Eureka hill, in Tintic mining district, Juab county, Utah Territory, to wit:

"The Eureka lode" and the premises appurtenant thereto, embracing 2,200 linear feet of said lode, to wit, 1,000 feet extending southerly from the discovery stake thereon and 1,200 feet extending northerly from said discovery stake on the northern extension of said Eureka lode, and the said premises being described as follows, Beginning at a monument at the northwest corner of said area and distant 103 feet from United States mineral monument No. two (2); running thence south 19 deg. 47′ east 1,200 feet, thence south 12 deg. 40′ east 400 feet, thence south 2 deg. 45′ east 600 feet, thence north 70 deg. 13′ east 140 feet, thence north 2 deg. 45′ west 600 feet, thence north 11 deg. 15′ west 400 feet, thence north 17 deg. 0′ west 1,200 feet, thence south 70 deg. 13′ west 200 feet, to place of beginning, the said lode, area, and premises being more fully described in the patent of the United States therefor issued to the Eureka Mining Company of Utah and dated the 27th day of September, 1875.

505 Also the "Montana lode" and the land and premises appurtenant thereto, embracing 2,200 feet of and along said lode, being 1,200 feet of Montana discovery location and 1,000 feet of the Montana northern extension, the said lode and the premises and area claimed therewith being described as follows:

Beginning at a monument at the northwest corner of said area, which is situate north 37 deg. 12′ east of and distant 135 feet from United States mineral monument No. 2 (2), and running thence

north 72 deg. 45′ east 125 feet, thence south 15 deg. 10′ east 1,200 feet, thence south 9 deg. east 400 feet, thence south 2 deg. 45′ east 600 feet, thence south 79 deg. 45′ west 65 feet, thence north 2 deg. 45′ west 600 feet, thence north 11 deg. 15′ west 400 feet, thence north 17 deg. west 1,200 feet, to the place of beginning, the said lode, area, and premises being more fully described in the United States patent therefor issued to the Eureka Mining Company of Utah and dated September 27th, 1875.

Also the "Eureka Twin lode" and the land and premises appurtenant thereto, embracing 2,000 linear feet of and upon said lode, being 1,200 feet northerly and 800 feet southerly from the discovery stake thereof, with a space 100 feet in width on each side thereof extending throughout said claim; also the Young Lion lode and the land and premises appurtenant thereto, embracing 2,200 linear feet of and upon said lode, being 1,000 feet of Young Lion discovery location and 1,000 feet of Young Lion northern extension and 200 feet of Young Lion southern extension, together with a space 100 feet in width on each side of said lode extending throughout said claim.

506 Also the Left Bower lode and the land and premises appurtenant thereto, embracing 600 linear feet of and upon said Left Bower lode, extending southern from the discovery stake thereon, with a space 100 feet in width on each side of the said lode throughout the claim.

Also the Deseret lode and the land and premises appurtenant thereto, embracing 2,200 linear feet of and upon said lode, being 1,000 feet of Deseret discovery location and 1,000 feet of Deseret northern extension and 200 feet of southern extension, with a space of 100 feet in width on each side of said lode extending throughout the claim.

Also the works, shafts, tunnels, and machinery of said mines and the buildings, lots, and offices which belonged to said Eureka Mining Company of Utah on the 15th day of September, 1872, being lots number two, in the town of Eureka City, in the county and Territory aforesaid, each and all of the mines, lodes, and mining claims hereinbefore named being situate on Eureka hill, Tintic mining district, Utah Territory, to be sold by me at the front door of the court-house, in the town of Nephi, county of Juab and Territory of Utah, on the 9th day of September, 1876, at five o'clock in the afternoon; that I caused due and legal notice of said sale to be given by posting for twenty days next previous thereto in three public places in said town of Nephi, where said property was sold, and in three public places in the precinct where said property is situated written notices of the time and place of said sale, in which notices said property was particularly described, and that on the said 9th day of September, 1876, I attended at the town and place fixed for said sale and exposed said premises for sale in one

507 parcel at public auction, according to law, to the highest bidder, for cash, when Joab Lawrence being the highest bidder therefor, the said premises were struck off by me to the said Joab Lawrence for the sum of seventy-five thousand dollars, which

was the highest sum bid and whole price paid therefor and which I acknowledged to have received, and that I delivered to said purchaser a certificate of said sale and filed a duplicate thereof in the office of the county recorder of said county of Juab; that, having retained my costs and the expenses of said sale, amounting to $455.00, I have paid over to the attorneys of the plaintiff the balance of said proceeds of sale, amounting to $74,545.00, and that, after applying said last sum in satisfaction of said judgment, there still remains due and unpaid thereon the sum of $8,603.50.

WILLIAM NELSON,
United States Marshal,
By J. FRED. CORKER, *Deputy.*

Dated September 13th, 1876.

508 In the District Court for the First Judicial District.

JOAB LAWRENCE, Plaintiff,
vs.
THE EUREKA MINING COMPANY OF UTAH and THE EUREKA HILL MINING COMPANY, Defendants.

This cause having been this day brought on to be heard upon the complaint filed therein and upon the answers filed thereto by the Eureka Mining Company of Utah and the Eureka Hill Mining Company, and due proof having been made on the filing and recording of the mortgage in said complaint set up in the offices of the recorders of Juab and Utah counties, in which counties the property affected by said mortgage in said complaint is situated, and the court having heard the proofs necessary to enable it to render judgment herein, and it appearing to the court from said proofs that there is due to the plaintiff from said Eureka Mining Company of Utah *from* principal and interest upon the debt and mortgage set up in said complaint the sum of seventy-seven thousand two hundred and ninety-three and $\frac{71}{100}$ dollars (77,293.71), lawful money of the United States of America, which sum is to draw and bear interest from the date hereof at the rate of twenty per cent. per annum, payable in like lawful money, and that all the allegations in said complaint are true:

509 Now, on motion of Messrs. Hempstead and Gamble, counsel for plaintiff, it is adjudged and decreed that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and costs in the suit and expenses of sale, and which may be separately sold without material injury to the parties interested, be sold at public auction by or under the direction of the United States marshal for the Territory of Utah.

That the said marshal give public notice of the time and place of such sale according to the course and practice of the court and the law relative to the sales of real estate under execution, and that

the plaintiff or any of the parties to this suit may become the purchasers at such sales, and that the said marshal, after the time allowed by law for the redemption has expired, execute a deed or deeds to the purchaser or purchasers of the mortgaged premises on the said sale.

That the said marshal out of the proceeds of such sales retain his fees, commissions, and disbursements on said sale and pay to the plaintiff or his attorneys out of said proceeds his costs in this suit, taxed at thirty-three and $\frac{80}{100}$ dollars, and the sum of three thousand eight hundred and sixty-two and $\frac{00}{100}$ dollars, fixed by said mortgage and allowed by the court as counsel fees of foreclosure, with interest thereon at the rate of twenty per cent. per annum from the date of this decree, and also the amount so found due as aforesaid, with interest thereon at the rate of twenty per cent. per
510 annum from the date of this decree, or so much thereof as the said proceeds of sales will pay for the same.

That the defendants and all persons claiming or to claim from or under them or either of them, all persons having liens subsequent to said mortgage by judgment or decree upon the land or premises described in said mortgage and his or her or their heirs or their personal representatives, and all persons having a lien or claim by or under such subsequent judgment or decree and their heirs or personal representatives, and all persons claiming under them and all persons claiming to have acquired any estate or interest in said premises subsequent to said mortgage and the due record thereof or subsequent to the filing of a notice of the pendency of this action in the office of the recorder or recorders of the county or counties where said property is situated, be forever barred and foreclosed of and from all redemption and claim of, in, or to said mortgaged premises and every part and parcel thereof from and after the delivery of the said marshal's deed.

And it is further adjudged that if the moneys arising from the sale shall be insufficient to pay the amount so found due to the plaintiff, as hereinbefore stated, with interest and costs and attorneys' fees of foreclosure and expenses of sale as aforesaid, the said marshal specify the amount of said deficiency and balance due to the plaintiff in his return, and that on coming in of said return a judgment of this court shall be docketed against the defendant The Eureka Mining Company of Utah, and that The Eureka Mining Company of Utah, defendant, which is personally liable for
511 the debt secured by the said mortgage, pay to the plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of twenty per cent. per annum from the date of said last-mentioned return and judgment, and that plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the complaint filed in this action, are as follows, to wit:

All and singular the mining property, lodes, mines, leads, or deposits which belonged to said Eureka Mining Company of Utah on

the 15th day of September, 1872, situate, lying, and being in Eureka hill, in Tintic mining district, near Eureka City, in Juab county, Territory of Utah, described as follows, to wit, the Eureka lode, a vein or deposit of silver-bearing rock, and the land and premises adjacent thereto, embracing 2,200 linear feet of said lode, to wit, one thousand feet extending southerly from the discovery stake thereon and 1,200 linear feet extending northerly from the discovery stake on the northern extension of said Eureka lode, the said lode being more particularly described in the United States patent therefor issued to the said Eureka Mining Company of Utah and now of record in the office of the recorder of said Juab county, and to which reference is hereby made.

Also the Montana lode, a vein or deposit of silver-bearing rock, and the land and premises adjacent thereto, embracing 2,200 linear feet on and along said lode, being twelve hundred (1,200) feet of the Montana discovery location and 1,000 feet of the
512 Montana northern extension, more particularly described in the United States patent therefor issued to said Eureka Mining Company of Utah and now of record in the office of the recorder of said Juab county, and to which reference is hereby made.

Also the "Eureka Twin lode," a vein or deposit of silver-bearing rock, and the land and premises appertaining thereto, embracing 2,000 linear feet of, along, and upon said lode, being 1,200 feet northerly and 800 feet southerly from the discovery stake thereof, together with a space 100 feet in width on each side thereof, extending throughout said claim.

Also the "Young Lion lode," a vein or deposit of silver-bearing rock, and the land and premises thereto, embracing 2,200 linear feet of and upon said lode, being 1,000 feet of Young Lion discovery location and 1,000 feet Young Lion norther- extension and 200 feet Young Lion southern extension, together with a space 100 feet in width on each side of said lode, extending throughout the entire claim.

Also the "Left Bower lode," a vein or deposit of silver-bearing rock, and the land and premises adjacent and appurtenant thereto, embracing 600 linear feet of and upon said lode, extending southerly from the discovery stake thereon, with a space 100 feet in width on each side thereof, extending throughout said claim.

Also the "Deseret lode," a vein or deposit of silver-bearing rock, and the land and premises adjacent thereto, embracing 2,200 linear feet of and upon said lode, being 1,000 feet of Deseret discovery location and 1,000 feet of Deseret northerly extension and
513 200 feet of Deseret southern extension.

Also all and singular the works and shafts and tunnels — and of said mines, and all the tools and machinery at and used in connection therewith by the said Eureka Hill Mining Company.

Also the building lots, offices, and other real estate used in connection with said mines or the working thereof by the said Eureka Mining Company of Utah.

And also that certain quartz mill, with the machinery, tool-, material, and the lands appurtenant thereto, belonging to said

Eureka Mining Company of Utah and known as the mill of the Eureka Mining Company of Utah, situate in the town of Homansville, in the county of Utah, Territory of Utah, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and any and all right to or interest acquired by said Eureka Mining Company of Utah in or to said property and premises and every and any parcel thereof since the said 14th day of September, 1872.

PHILIP H. EMERSON,
Judge First District Court.

Dated July 27th, 1876.

TERRITORY OF UTAH, } ss:
County of Utah, }

I, A. C. Emerson, clerk of the first judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the decree and order of sale and officer's return now on file in my office, at Provo City, Utah Territory.

514 Witness my hand and seal of said court, at Provo City, this 27th day of October, A. D. 1885.

[SEAL.]

A. C. EMERSON, *Clerk,*
By BENJ. BACHMAN,
Deputy Clerk.

Endorsed: First district court. Joab Lawrence *vs.* Eureka Mining Company of Utah. Copy of decree and order of sale. Report of sale, Exhibit No. 8.

EUREKA EXHIBIT No. 9.

Book G, fo. 568.

This indenture, made the 13th day of March, A. D. 1877, between William Nelson, United States marshal for this Territory of Utah, by J. Fred. Corker, deputy United States marshal for said Territory of Utah, party of the first part, and Joab Lawrence, of the city of Salt Lake, in said Territory party of the second part, witnesseth, whereas, in and by certain judgment or decree made and entered by the district court of the first judicial district of said Territory of Utah, on the 27th day of July A. D. 1876, in a certain action then pending in said court, wherein said Joab Lawrence was plaintiff, and The Eureka Mining Company of Utah and The Eureka Hill Mining Company, were defendants, it was among other things ordered, adjudged and decreed that certain premises and property in said judgment, and hereinafter described, should be sold at public auction by the said marshal, in the manner required by law according to the course and practice of the said court.

515 That either of the parties to said action might become the purchaser at such sale; and, whereas, the said marshal did on the 9th day of September A. D. 1876, at the hour of five o'clock in the afternoon, at the front door of the court-house, in the town of

Nephi in the county of Juab, in said Territory of Utah, after due public notice had been given as required by law and the practice of said court, duly sell at public auction agreeable to said judgment and provisions of law, the premises in said judgment ordered described at which sale the said premises were fairly struck off and sold to the said Joab Lawrence, the party of the second part, for the sum of seventy-five thousand dollars, he being the highest bidder and that being the highest sum bid for the same, and

Whereas, said party of the second part thereupon paid the said marshal the said sum so bid by him and said marshal thereupon made and issued the usual certificate in duplicate of said sale in due form of law, and delivered one thereof to the said purchaser and caused the other to be filed in the office of the county recorder of said county of Juab; and,

Whereas, more than six months have elapsed since said sale and no redemption has been made of the premises so sold;

Now, this indenture witnesseth, that the said party of the first part, the said marshal, in order to carry into effect the sale so made by him as — such case made and provided, and in consideration of the premises and of the said sum of seventy-five thousand dollars, so bid, and paid by said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and
516 conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the right, title and interest, which the Eureka Mining Company of Utah had on the 15th day of September, 1872, or thereafter acquired in or to the following lode, mines, mining claims, or veins of mineral-bearing rock, situate, on the Eureka hill in Tintic mining district, Juab county, Utah Territory, to wit: The Eureka lode and the premises and appurtenances thereto, embracing 2,200 linear feet of said lode, to wit: 1,000 feet extending southerly from the discovery stake thereon, and 1,200 feet extending northerly from said discovery stake on the northern extension of said Eureka lode, the said premises being described as follows: Beginning at a monument at the northwest corner of said area and premises, said monument and corner being north 75 deg. 35′ west of and distant 103 feet from the United States mineral monument number two (2) running thence south 19 deg. 47′ east 1,200 feet, thence south 20 deg. 40′ east 400 feet, thence south 2 deg. 45 min. east six hundred feet; thence north 70 deg. 13 min. east one hundred and forty feet; thence north 2 deg. 45 min. west six hundred feet; thence north 11 deg. 15 min. west four hundred feet; thence north 17 deg. west twelve hundred feet; thence south 70 deg. 13 min. west two hundred feet to the place of beginning, the said lode area and premises being more fully described in the patent of the United States therefor, issued to the Eureka Mining Company, of Utah, dated 27th day of September 1875, also the Montana lode and the land and premises appertaining thereto, embracing 2,200 feet of and along said lode, being 1,200 feet of Montana discovery lo-
517 cation and 100 feet of the Montana northern extension, the said lode and area and premises claimed therewith being

described as follows: Beginning at a monument at the northwest corner of said area, which is situated north 36 deg. 12 min. east of and distant 135 feet from United States mineral monument number two (2) and running thence north 79 deg. 45 min. east, 125 feet, thence south 15 deg. 10 min. east 1,200 feet, thence south 90 deg. 400 feet east, thence south 2 deg. 45 min. east 60 feet, thence south 79 deg. 45 min. west 65 feet; thence north 2 deg. 45 min. west 600 feet; thence south 79 deg. 45 min. west 65 feet; thence north 17 deg. west 1,200 feet to the place of beginning, the said lode area and premises being more fully described in the United States patent therefor, issued to the Eureka Twin lode and the land and premises appurtenant thereto, embracing 2,000 feet of and upon said lode, and being 1,200 feet northerly and 800 feet southerly from the discovery stake thereof, with a space of 100 feet in width on each side thereof extending throughout said claim; also the Young Lion lode and the land and premises described and appurtenant thereto, embracing 2,200 feet of and upon said lode, being 100 feet of Young Lion discovery location, and upon said 1,000 feet of the Young Lion northerly extension, and 200 feet of the Young Lion southerly extension, together with a space of 100 feet in width on each side of said lode, extending throughout said claim, also the Left Bower lode and the land and premises appurtenant thereto, embracing 600 linear feet of and upon said Left Bower lode, extending southerly from the discovery stake thereon, with a space 100 feet in width on each side of
518 said lode extending throughout said claim; also the Deseret lode and the land and premises appurtenant thereto, embracing 2,200 linear feet of and upon said lode, being 100 feet of Deseret discovery location and 100 feet of Deseret northern extension, and 200 feet of Deseret southern extension, with a space of 100 feet in width on each side of said lode extending throughout said claim; also the works, shafts, tunnels and machinery of said mines and the buildings lots and offices which belong to said Eureka Mining Company of Utah, on the 15th day of September 1872, being lot (2) two, in the town of Eureka City, Tintic mining district, Utah Territory, together with all and singular the tenements and appurtenances thereunto belonging or in anywise appertaining. To have and to hold the same unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part by his said deputy, duly authorized thereto, has hereunto set his hand and seal the day and year first above written.

WILLIAM NELSON,
United States Marshal,
By FRED. CORKER,
Deputy U. S. Marshal. [SEAL.]

Signed, sealed, and delivered in the presence of—
E. T. SPRAGUE.
J. W. GREENMEN.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On this 13th day of March, A. D. 1877, before me, E. T. Sprague, clerk of the supreme court in and for said Territory, personally appeared Fred. J. Corker, deputy United States marshal of said Territory, personally known to me to be the same person de-
519 scribed in and who executed, as the deputy of William Nelson, United States marshal, the foregoing deed for and in the name of said Nelson, the party of the first part thereto, and the said Corker acknowledged to me that he executed said deed freely and voluntarily as and for the act and deed of said Nelson and for the uses and purposes herein mentioned.

In witness whereof I hereunto set my hand and the seal of said court the day and year in this certificate first above written.

E. T. SPRAGUE,

[SEAL.] *Clerk of the Supreme Court, Utah Territory.*

Recorder March 27th, at 45 minutes past 11 a. m.

TERRITORY OF UTAH, } ss:
County of Juab, }

I, Alma Hague, recorder in and for the county of Juab, Territory of Utah, do hereby certify that the above and foregoing is a true, full, and correct copy of deed from "Nelson to Lawrence" as appears upon Book "G," page 568, records of Juab county.

In witness whereof I have hereunto set my hand and affixed my official seal this 3rd day of December, A. D. 1884.

[SEAL.] ALMA HAGUE, *Recorder.*

Endorsed: United States marshal to Joab Lawrence. Deed, Exhibit No. 9.

520 EUREKA EXHIBIT No. 12.

(Book —, fo. 572.)

This indenture, made the fourteenth day of March A. D. 1877, between Joab Lawrence of the city and county of Salt Lake, Territory of Utah, party of the first part, and Eureka Hill Mining Company, a corporation of the Territory of Utah, party of the second part, witnesseth, that the party of the first part for and in consideration of one dollar to him in hand paid, and also in consideration of three thousand (3,000) shares of the capital stock of said Eureka Hill Mining Company has granted, bargained sold, remised, released and quitclaimed and by these presents doth grant, bargain, sell, remise, release and quitclaim unto the said party of the second part, its successors and assigns, all those certain lodes, mines, and lands and premises situated in Eureka hill, Tintic mining district, Juab county, Utah Territory, to wit: The Eureka lode and the premises appurtenant thereto, embracing 2,200 feet of said lode, to wit: 1,000 linear feet extending southerly from the discovery stake, on the

northern extension of said Eureka lode the said premises being described as follows: Beginning at a monument at the northwest corner of said area and premises, said monument and corner being north 75 degrees 35′ west of and distant from the United States mineral monument No. two (2) 103 feet running thence south 19 degrees 47′ east 1,200 feet, thence south 70 degrees 13′ east 140 feet, thence north 2 degrees 45′ west 600 feet, thence north 70 degrees 13′ east 140 feet, thence north 2 degrees 45′ west 600 feet, thence north 11 degrees 15′ west 400 feet, thence north 17 degrees
521 west 1,200 feet; thence south 71 degrees 13′ west 200 feet to place of beginning. The said lode area and premises being more fully described in the patent of the United States therefor, issued to the Eureka Mining Company of Utah, and dated the 27th day of September 1875; also the "Montana lode" and the land and premises appurtenant thereto, embracing 2,200 feet of said lode. Being 1,200 feet of the Montana discovery location, and 100 feet of Montana northern extension. The said lode and area and premises claimed therewith being described as follows. Beginning at a monument at the northwest corner of said area which is situate north 37 degrees 12′ east of and distant 135 feet from the United States mineral monument No. two (2) and running north 79 degrees 45′ west 65 feet, thence south 2 degrees 45′ east 600 feet, thence south 79 degrees 45′ west 65 feet, thence north 17 degrees west 1,200 feet to the place of beginning. The said lode area and premises being more fully described in the United States patent issued therefor, issued to the Eureka Mining Company of Utah, and dated September 27th, 1875.

Also the Eureka Twin Land lode and the land and *the land and* premises appurtenant thereto, embracing 2,000 feet of and upon said lode being 1,200 feet northerly and 800 feet southerly from the discovery stake thereof, with a space 100 feet in width on each side thereof, extending throughout said claim.

Also the Young Lion lode and the land and premises appurtenant thereto embracing 2,200 feet of and upon said lode, being 1,000 feet of Young Lion discovery location and 1,000 feet of Young Lion northerly extension, and 200 feet of Young Lion southerly
522 extension together with a space 100 feet in width on each side of said lode extending throughout said claim. Also the Left Bower lode and the land and premises appurtenant thereto, embracing 600 linear feet of and upon said Left Bower lode, extending southerly upon the discovery stake thereon, with a space 100 feet in width on each side of said lode extending throughout said claim.

Also the Deseret lode and the land and premises appurtenant thereto, embracing 2,200 linear feet of and upon said lode, being 1,000 feet of Deseret discovery location and 1,000 feet of Deseret northern extension, and 200 feet of Deseret southern extension, with a space 100 feet in width on each side of said lode extending throughout said claim.

Also the works, shafts tunnels, and machinery of said mines and the building lots, and offices formerly belonging to the said Eureka Mining Company of Utah, being lot number two (2) in the town of

Eureka City in the county and Territory aforesaid together with all dips, spurs, angles, metals, ores, and all the rights and privileges and franchises thereto incident or appurtenant, or therewith usually had and enjoyed, and all the estate, right, title, possession, claim and demand, of the party of the first part of in or to the premises and every part and parcel thereof, to have and to hold all and singular the premises, with the privileges and appurtenances unto the party of the second part, its successors and assigns forever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

523 JOAB LAWRENCE. [SEAL.]

Sealed and delivered in the presence of—

The word "Hill" three times erased before signing, to wit, on the 2nd, 3rd, and 5th pages—

A. S. PATTERSON.

J. E. BAMBERGER.

524 *Specifications of Errors.*

First. The evidence was insufficient to justify the decision and finding in the following words contained in the fourth finding, viz:

"That the remaining twenty thousand (20,000) dollars of said forty-three thousand five hundred eighty-seven and fifty-one — ($43,587.51) dollars secured by said mortgage represented an indebtedness due from said Eureka Mining Co. of Utah to said Lawrence individually; that said mortgage was not given to secure in whole or in part any indebtedness due from said company to said plaintiff or to said Wood on account of services rendered by them or either of them to said company."

And the said court erred in deciding and finding as stated in the words so quoted from said fourth finding. There was express evidence that said Lawrence received the said twenty thousand ($20,000) dollars, and that there was an actual understanding between him, said plaintiff, and William H. Wood that the same should be added to the sum of twenty-three thousand five hundred eighty-seven and fifty-one hundredths ($23,587.51) dollars as the mortgage debt, and that said parties should have an interest therein proportionate to the sums included belonging to them respectively.

Second. The evidence was insufficient to justify the finding and decision contained in the concluding words of finding No. five, in

525 which the interest of plaintiff in said mortgage is limited to one-eighth ($\frac{1}{8}$) of twenty-three thousand five hundred eighty-seven and fifty-one hundredth- ($43,587.51) dollars, and the said court erred in so finding. See explanation in first specification.

Third. The evidence was insufficient to justify the finding and decision in the following words contained in the ninth finding: "That Joab Lawrence claimed and received the dividends thereon as his own property, and did not at any time recognize any right or interest therein belonging to plaintiff."

And said court erred in so finding. The evidence shows the contrary of the said finding and every part thereof.

Fourth. The evidence was insufficient to justify the eleventh finding, and the court erred in so finding. The evidence shows the contrary fact.

Fifth. The evidence was insufficient to justify that part of the thirteenth finding in the following words, viz:

"And that he (plaintiff) had actual knowledge as early as the month of March, 1880, that said Lawrence denied and repudiated any alleged interest or claim of said plaintiff in or to any part of said three thousand shares of stock, or in the dividends that had been declared and paid thereon, or in any part of the property mentioned in the complaint; that the said Lawrence, in part consideration of said conveyance to said Eureka Hill Mining Company under date of March 13th, 1877, received, in addition to said three shares of stock of the property, to wit: a quartz mill; that as early as the summer of 1877 the plaintiff had actual knowledge that the said Lawrence had sold and disposed of the machinery of said mill, and was informed of said sale by said Lawrence in per-
526 son; but he, said plaintiff, did not then, nor has he at any time since, made a demand upon the said Lawrence or his representatives for any part or portion of the proceeds of said sale, nor did he then, nor has he at any time since, made any inquiry as to the amount realized by said Lawrence from said sale, although ignorant of the terms thereof."

And said court erred in so finding. There was no evidence relating to the fact so found; or if there was evidence the facts so found are only half the truth, and the other half *is* stated as shown by the evidence would furnish an explanation which would entitle the plaintiff to a finding in his own favor, that there was a continuing trust as claimed in the complaint.

Sixth. The evidence was insufficient to justify the fourteenth finding, and the court erred in so finding. The only information which the evidence shows that the plaintiff had was information from Lawrence himself, recognizing said trust, that the amount received was only about equal to assessments; at the same time, saying that the rents from the Detroit property barely sufficed to pay taxes and other expenses.

Seventh. That the evidence was insufficient to justify the fifteenth finding, and the court erred in so finding. The facts are as stated in the explanation in the sixth specification.

Eighth. The evidence was insufficient to justify that portion of the sixteenth finding in the following words, viz:

"That in November or December, 1885, and after said plaintiff had received actual knowledge of the receipt by said Lawrence of said fifty-four ($54.00) dollars per share of said three thousand
527 shares of stock, he, said plaintiff, met and conversed with said Lawrence in said Salt Lake City, but made no demand or request of said Lawrence for any part of said dividend."

And the court erred in so finding. Said finding contains but half the truth shown by the evidence relating to the time therein

mentioned, and if the whole truth were found it would import a recognition of the trust alleged in the complaint.

Ninth. The evidence was insufficient to justify that portion of the sixteenth finding in the following words, viz:

"That said plaintiff never made any demand or request of said Lawrence for any portion of said three thousand shares of stock or for any portion of the dividends which had been declared or paid thereon as aforesaid, or any part or portion or interest in said real estate mentioned in said complaint, or the rents, issues, or profits thereof, prior to April 6th, 1888."

* * * That plaintiff well knew for many months prior to said demand that said Lawrence had been deprived of his reason and mental faculties.

And said court erred in so finding. The evidence shows a continued recognition of the trust alleged in the complaint from time to time up to said date, April 6th, 1888, and also that at said date Lawrence was not disqualified mentally to do business.

Tenth. The evidence was insufficient to justify that part of the sixteenth finding in the following words, viz:

"That during the latter part of the year 1887 the mind and memory of said Lawrence became so impaired by disease that it was not possible for him to attend to ordinary business mat-
528 ters, and from thence to his death such impairment of his faculties daily increased, so that from the first of the year 1888 until his death he was unable to comprehend any matter of business submitted to him."

And the court erred in so finding. The evidence showed that said Lawrence, though out of health, had intelligence and memory sufficient to qualify him to understand business and the purport of the demand made on him by plaintiff on the 6th day of April, 1888.

ARTHUR BROWN,
Att'y for Pl'ff.

Specification of Errors.

First. The evidence was insufficient to justify the decision and finding in the following words contained in the fourth finding, viz:

"That the remaining $20,000 of said $43,587.50 secured by said mortgage represented an indebtedness due from said Eureka Mining Co. of Utah to said Lawrence individually; that said mortgage was not given to secure in whole or in part any indebtedness due from said company to said plaintiff or to said Whitney on account of services rendered by them or either of them to said company."

And the said court erred in deciding and finding as stated in the words so quoted from said fourth finding. There was express evi-
529 dence that said Lawrence received the said $20,000 and there was an actual understanding between him, said defendant, and Wood that the same should be added to the sum of $23,587.50 as the mortgage debt, and that said parties should have

an interest therein proportionate to the sums included, belonging to them respectively.

Second.

The evidence was insufficient to justify the finding and decision contained in the concluding words of finding No. 5, in which the interest of plaintiff in said mortgage is limited to one-eighth of $23,587.50, and the said court erred in so finding. See explanation in first finding.

Assignment of Errors.

The plaintiff assigns as errors the action of the court in its ruling upon testimony as follows:

1. "In this cause, at the hearing thereof, evidence was received of said plaintiff by deposition, subject to the objection of the defendant. Before rendering the findings in said cause I decide and determine as a part of the findings that the evidence of the said plaintiff as to any matter or fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Wood and said deceased, cannot be received in his favor in this case and is to be excluded; to which ruling defendant, by his counsel, except;" which action of the court the plaintiff assigns as error.

530 2. The court erred in sustaining the objection of counsel for defendant to the question propounded to the witness Hill by counsel for the plaintiff as to the character of the plaintiff Whitney, and also in the action of the court in refusing to permit the plaintiff to prove by Noble, Carn, Lowe, Dyer, Scott, Harkness, Kimball, Culmer, Raybould, Pickard, McIntosh, and others that they had known the witness Whitney for a period ranging from 15 to 18 years; that they were acquainted with his general reputation and character for truth and veracity; that that character was good and that they would give him full faith and credit on his oath in a court of justice.

3. The court erred in its action in refusing to allow the plaintiff Whitney to prove by the same persons mentioned in the last above assignment that they knew the plaintiff Whitney and had known him for 15 to 20 years, and that they knew his general character in reference to honesty and fair dealing and that his character was good.

4. The court erred in excluding the testimony of plaintiff, John N. Whitney, as taken in the deposition in New York.

5. The court erred in excluding the testimony of John N. Whitney as taken in his own behalf orally upon the stand and in excluding him as a witness on the ground of his incompetency.

6. The court erred in sustaining the objection of counsel for defendant to the testimony of L. S. Hills offered to be produced to show the integrity and honesty of the said John N. Whitney.

ARTHUR BROWN,
Att'ys for Pl'ff.

531 Within ten days after the filing of the findings of fact the plaintiff served and filed a notice of intention to move for a new trial, of which this is a copy:

JOHN N. WHITNEY, Plaintiff,
vs.
MOYLAN C. FOX and SARAH M. LAWRENCE, Executors of the Last Will and Testament of Joab Lawrence, Deceased, Defendants.

Notice of Motion for New Trial.

To Messrs. Bennett, Marshall & Bradley, attorneys for defendants.

GENTLEMEN: You will please take notice that the above-named plaintiff hereby gives notice of his intention to move for a new trial in said case, and to set aside the findings and decree therein, for the reason:

1. That the evidence is insufficient to justify the findings and decision of the court.
2. That the said findings and decision are contrary to law.
3. Errors in law occurring at the trial and excepted to by the party making the application, to wit, the said plaintiff.

This motion will be based upon a statement to be hereafter prepared and on file and record.

SUTHERLAND & JUDD AND
ARTHUR BROWN,
Attorneys for Plaintiff.

532 Whereas the foregoing statement contains substantially all the evidence bearing upon the specifications involved in this case: Therefore, after the same has been duly submitted to the counsel for the defendants and amendments proposed, it is hereby settled and signed by the court.

Dated January 8, 1892.

T. J. ANDERSON,
Judge 3rd District Court, Utah.

Attest:
[SEAL.] HENRY G. McMILLAN, *Clerk,*
By GEO. D. LOOMIS, *Deputy.*

We hereby stipulate and certify that the foregoing is a correct transcript of the pleadings, findings, decree, motion for new trial, order thereon, and of the statement on motion for new trial in the above-entitled action.

Also that an undertaking on appeal in due form has been properly filed, and it is stipulated that the order of the district court that the original statement be withdrawn from the files of that court and incorporated in the above transcript was made by mutual consent.

Dated May 14th, 1892.

BENNETT, MARSHALL & BRADLEY,
For Defendants.

ARTHUR BROWN, *For Pl'ff.*

533 In the District Court for the Third Judicial District, Territory of Utah.

JOHN N. WHITNEY, Plaintiff,
vs.
MOYLAN C. FOX and SARAH M. LAWRENCE, Executors of Joab Lawrence, Deceased, Defendants.

Notice of Appeal.

To the clerk of said court and to Bennett, Marshall & Bradley and William H. Dickson, defendants' attorneys:

Take notice that the plaintiff appeals to the supreme court of the Territory of Utah from the judgment of the district court for the third judicial district of the Territory of Utah rendered in the above-entitled cause in favor of the said defendants on the 12th day of January, 1891, and also from the order made in said district court in said action on the 9th day of January, 1892, denying and overruling the plaintiff's motion for a new trial.

Dated January 11th, 1892.

BROWN & HENDERSON,
J. G. SUTHERLAND,
Attorneys for Plaintiff.

Endorsed: # 7982. Title court and cause. Notice of appeal. Served January 11th, 1892. W. H. Dickson, Bennett, Marshall & B., att'ys for def'ts. Filed Jan. 11, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

534 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, Henry G. McMillan, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, demand for allowance of claim, answer, findings of fact and conclusions of law, decree, notice of motion for a new trial, statement on motion for new trial, order overruling motion for new trial, notice of appeal; and I do further certify that the appellant has filed an undertaking on appeal, and the same is in due form in the action therein entitled filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 13th day of June, A. D. 1892.

[SEAL.] HENRY G. McMILLAN, *Clerk.*

535 In the Supreme Court of Utah Territory, Regular June Term, 1892.

THURSDAY, *August 4th.*

JOHN N. WHITNEY, Appellant,
vs.
MOYLAN C. FOX *et al.*, Ex'ors of Joab Lawrence, Deceased.
} Appeal from 3rd District.

This cause, coming on regularly for hearing, was argued by Arthur Brown, Esq., in behalf of appellant; by W. H. Dickson, Esq.; and John A. Marshall, Esq., in reply; was submitted and taken under advisement.

536 In the Supreme Court of Utah Territory, Regular January Term, 1893.

FRIDAY, *January 13th.*

JOHN N. WHITNEY, Appellant,
vs.
MOYLAN C. FOX, Ex'or of the Estate of Joab Lawrence, Deceased.
} Appeal from 3rd District.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered and adjudged (Miner, J., dissenting) that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

Regular January Term, 1893.

(Title Court and Cause.)

TUESDAY, *March 14th.*

The petition for a rehearing of this cause heretofore filed having been carefully considered, and the court being now fully advised thereon, it was ordered that said petition be, and the same is hereby, denied, and that a rehearing be not granted.

Thereupon counsel for appellant prays the allowance of an appeal to the Supreme Court of the United States, and asks that the amount of a bond to be given thereon be now fixed, and it was ordered that the appeal as prayed for be, and is hereby, allowed, and that the amount of a bond to be given thereon be, and is hereby, fixed at $500.00.

537 In the Supreme Court of Utah Territory.

WILLIAM H. WOOD, Appellant,
vs.
MOYLAN C. FOX *et al.*, etc., Respondents.

BLACKBURN, *J.:*

This suit is brought to enforce a trust, and claim a large amount of money, of many thousand dollars, due the plaintiff from the

estate of said decedent—accumulations from the trust property while in the hands of said decedent. Judgment for defendants, and plaintiff appeals, and assigns as for error that the evidence does not support the judgment. The complaint is as follows:

"The said plaintiff complains of the defendants and alleges that the deceased, Joab Lawrence, died in the city and county of Salt Lake, Territory of Utah, on or about the 28th day of December, 1888; that he died testate, leaving a will, which has since been probated in the probate court of the county of Salt Lake, and that the defendants, Moylan C. Fox and Sarah M. Lawrence, have been appointed executor and executrix of the said last will and testament of Joab Lawrence, and have qualified and entered upon the discharge of their duties as such executors, and are now the acting executors of said estate. Plaintiff further alleges that on or about and prior to the 7th day of October, 1872, he was the owner of 250 shares of the capital stock of the Eureka Mining
538 Company of Utah; that the said deceased, Joab Lawrence, was the owner of at least 1,500 shares of the capital stock of said mining company; that prior to said day this plaintiff delivered to the said deceased, Joab Lawrence, certificates of his stock, representing 250 shares of said stock, standing in his name on the books of the company—said Eureka Mining Company of Utah—said certificates being indorsed in blank; that he delivered the same to the deceased to be disposed of with the stock of the said deceased and for their joint benefit; that the said deceased, Joab Lawrence, on or about the day and year aforesaid, did sell and dispose of the said stock of his own and of this plaintiff to one Eber B. Ward, of Detroit, Mich.; that as a part of the consideration for said sale he received certain real property situate, lying, and being in the city of Detroit, Mich., consisting of three city lots and a building or hotel erected thereon, commonly known and designated as the 'Mansion House property'; that the said deceased, Joab Lawrence, procured the deed to said real property to be taken to him (the said Lawrence) individually, in his own name; that the same has since been recorded, and that the said deceased now stands the owner of record of the title to said Mansion House property; that in truth the consideration for the said Mansion House property was the sale of the said shares of stock of which the said plaintiff was a part owner; that the said plaintiff was the owner of one-eighth of said shares of stock thus traded to the said Eber B. Ward; that the said sale and exchange was really, although not appearing of record, in trust for this plaintiff to the extent of one-eighth
539 interest, and the said deed, although absolute on its face, was in truth and in fact secretly charged with a trust in favor of this plaintiff to the extent of his one-eighth interest therein, he having furnished purchase-money to that amount for the purchase of the said Mansion House property; that the said Lawrence, deceased, also received for the said shares of stock large amounts of other property, among other things a large amount of cash in hand, a part of which was invested in taking up an indebtedness against the said Eureka Mining Company, which was a corporation existing

and doing business under and by virtue of the laws of the Territory of Utah; that the said amount of cash thus used was $23,587.50, so that of the said proceeds of the sale of stock the said Lawrence received the amount of $23,587.50 in the form of an indebtedness against the said company, one-eighth of which belonged to and was the property of this plaintiff; that in recognition of the said trust in favor of this plaintiff in the said Mansion House property and of the said $23,587.50 the said Joab Lawrence executed and delivered to this plaintiff, on the 9th day of November, 1872, the following declaration of trust, to wit:

"'SALT LAKE CITY, *November* 9, 1872.

"'William H. Wood:

"'This is to certify that you are entitled to one-eighth interest in the real estate, mining and rolling-mill stocks, and in the $23,587.50 *of* which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit,
540 Michigan, October 7, less the farm of 160 acres which was given to A. A. Griffith. I have received of you twenty shares of Eureka stock, your one-eighth of the 160 shares, which was given to Messrs. Griffith and Mayhue.

"'JOAB LAWRENCE.'"

"Plaintiff further alleges that afterwards said Eureka Mining Company of Utah executed a certain mortgage to secure the said indebtedness, viz., the $23,587.50 and also other $20,000, the total amount of said mortgage being $43,587.50, to one Theodore F. Tracy, trustee, the said Tracy holding the said mortgage and the promissory note connected therewith as trustee for the said Joab Lawrence; that the note was dated September 15, 1872, and the said mortgage the 9th day of November, 1872. Plaintiff further shows that the other said $20,000, which the said mortgage was given to secure, was for $20,000 voted by the directors of the Eureka Mining Company for services to the said Lawrence, deceased, to one John N. Whitney and to this plaintiff; that the amount thus voted was to Joab Lawrence, $9,000; to J. N. Whitney, $5,500, and to plaintiff, W. H. Wood, $5,500, who had been a director and secretary of said company and having rendered it services for which said money was voted; that the said three items of salary account, amounting to $20,000, and the other $23,587.50 constituted the consideration and face of said mortgage, or $43,587.50; that the said account was never paid by the said company in money to this plaintiff, but was included in the said mortgage to Theodore F. Tracy; that the said mortgage was afterwards and prior to the 26th day of August, 1874, assigned by said Theodore F.
541 Tracy to the said deceased, Joab Lawrence, who received the same in trust for plaintiff to the extent of his interest therein, to wit, for one-eighth of $43,587.50, and for the said $5,500. Plaintiff further alleges that on the day and year last mentioned the said deceased, Joab Lawrence, took proceedings to foreclose the said mortgage in the first district court of Utah Territory, where

the property upon which the said mortgage was a lien was situate, and such proceedings were had in said cause that on the 27th day of July, 1876, a decree was duly made and entered foreclosing the equity and redemption of the said mining property and said premises and decreeing a sale thereof; that thereafter, in pursuance of the said foreclosure and decree, the said property and premises were sold on the 9th day of September, 1876, and conveyed to the said Joab Lawrence, deceased, individually by deed dated the 13th day of March, 1877, and recorded in the office of the county recorder of Juab county, Utah, on the 27th day of March, 1877, Book C; that thereafter such negotiations were had that all the right, title, and interest which the said deceased, Joab Lawrence, had acquired by reason of such decree of foreclosure and sale therein and as a beneficial owner in said trust deed was conveyed by the said deceased to the Eureka Hill Mining Company, a corporation organized and doing business under and by virtue of the laws of the Territory of Utah; that such conveyance was by deed dated the 14th day of March, 1877, and recorded in the office of the county recorder of Juab county, Utah, on the 27th day of March, 1877, in Book C, and that the consideration for the transaction was three-tenths of the entire
542 capital stock of said Eureka Hill Mining Company, to wit, 3,000 shares of the capital stock of said company, its entire capital stock being 10,000 shares of the par value of $100 each; that said 3,000 shares were issued by the said company to the said deceased in compromise and consideration of the conveyance to it of all the rights acquired by the said deceased under and by virtue of the said mortgage of $43,587.50; that through all these transactions the said deceased was acting not only in his own behalf, but also in behalf and for the use of this plaintiff, to the extent of the interest of this plaintiff in and to the said mortgage, which was the amount of one-eighth of the said $43,587.50 and the amount of said salary, making a total of $8,198.43, and the said Lawrence, deceased, held the certificate as trustee for the said plaintiff to the extent of said interest, amounting to 564 and $\frac{216}{1000}$ shares. Plaintiff further alleges that he is informed and believes that the said Eureka Hill Mining Company has from time to time declared dividends upon its capital stock; that the dividends declared since the said Lawrence received the said shares of stock aforesaid, and prior to his decease, amounted to $94 per share.

"That the same have been declared on the following dates, to wit:

1879—August 2	$1 00	per share.
September 15	1 00	"
October 15	1 00	"
1882—February 23	3 00	"
October 11	2 00	"
1883—March 17	2 00	"

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1883—June 4	2 00	"
July 17	2 00	"

	August 1	2 00	per share.
	August 25	2 00	"
	August 22	2 00	"
	November 1	2 00	"
	December 5	2 00	"
1884—	January 8	2 00	"
	February 1	2 00	"
	March 1	2 00	"
	June 5	2 00	"
	September 24	2 00	"
	November 12	2 00	"
	December 10	2 00	"
1885—	January 6	5 00	"
	February 3	2 00	"
	April 6	2 00	"
	June 1	2 00	"
	September 7	2 00	"
1886—	February 16	4 00	"
	September 5	2 00	"
	December 6	2 00	"
1887—	February 7	3 00	"
	April 4	2 00	"
	July 6	2 00	"
	September 5	2 00	"
	October 6	2 00	"

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1887—	November 7	2 00	"
	December 5	2 00	"
1888—	January 2	2 00	"
	February 6	5 00	"
	March 5	2 00	"
	May 7	2 00	"
	August 6	4 00	"
	September 3	2 00	"
	Total dividends declared	$94 00	

"That plaintiff further alleges on information and belief that the said Lawrence, deceased, received the said dividends that were declared prior to the 1st day of April, 1888, and that he had a right to and his executors now claim the remainder of the said dividends; that they are now in the hands of the said company and have not yet been paid over to the said deceased or to his executors. Plaintiff further alleges that the said Eureka Hill Mining Company is very prosperous, is doing a large business, has a large amount of property, and that the shares are very valuable, to wit, of the value of at least $100 per share, and that the said company are now so conducting the business that dividends will be continually accruing and will be declared in the future. Plaintiff further alleges that there never has been any accounting, settlement, or examination of the affairs of the trusteeship between said deceased, Joab Lawrence,

and this plaintiff prior to his decease; that the said plaintiff had never demanded a settlement of the said trusteeship until the spring of 1888; that he then demanded a settlement of the said trust
545 matters, which was denied, and suit was brought to enforce the same in the supreme court of the city and county of New York; that said suit was undetermined at the time of the death of said Lawrence and abated by his death. Plaintiff further shows that he did not for many years know of the value and business done by the Eureka Hill Mining Company or the amount of dividends that had been declared by them, and it was only recently that he heard that they were declaring large dividends, and then, at his first opportunity, he demanded a settlement thereof. Plaintiff further shows that the said deceased, up to the time of his death, received all the rents, issues, and profits of the said real estate situate in the city of Detroit, Mich., and that the amount thereof is unknown to this plaintiff; that the title to the said real estate at the time of his said decease stood in the name of the said Lawrence, and plaintiff is fearful, unless restrained by the court, that the said defendants may dispose of the said real estate and of the said shares of stock. Plaintiff further shows that the said defendants, the executors of the estate of said Lawrence, deceased, deny that the said land and the said shares of stock are or ever were held in trust by the said deceased, in whole or in part, for this plaintiff, and have caused the same to — inventoried as the property of the said deceased, and threaten to settle the said estate and divide and distribute the said property in violation of the said rights of this plaintiff, as if the whole thereof belonged to the said Lawrence, deceased, and as if this plaintiff had no interest therein; that on or about the 10th day of September, 1889, this plaintiff presented
546 his claim in writing to the said executors; that on or about the 10th day of September, 1889, the said executors rejected the said claim. Wherefore this plaintiff demands judgment:

"(1.) That this plaintiff be decreed to be the equitable owner and entitled to one-eighth ($\frac{1}{8}$) of the said Mansion House property, in Detroit, Mich., and to the rents, issues, and profits thereof and to the 564 and $\frac{216}{1000}$ shares of the said 3,000 of the Eureka Hill Mining Company stock and to all dividends that have heretofore been declared thereon.

"(2.) That the said executors be required to account to this plaintiff for all the rents, issues, and profits received by the said deceased upon the said Mansion House property since the 7th day of October, 1872, and for all the dividends received by the said deceased, Joab Lawrence, on the said 564 and $\frac{216}{1000}$ shares of stock of the Eureka Hill Mining Company and the interest thereon.

"(3.) That the said executors be required to convey to this plaintiff by good and sufficient deed one-eighth undivided interest in the said Mansion House property, in the city of Detroit, Mich.

"(4.) That the said executors be required to assign to this plaintiff, of the said shares of stock of the Eureka Hill Mining Company, the amount belonging to him in pursuance of said trust, to wit, 564 and $\frac{216}{1000}$ shares.

"(5.) That a receiver be appointed of the entire amount of the said shares of stock held in trust in part for this plaintiff by the said deceased, Joab Lawrence, to wit, the said 3,000 shares of stock, to receive the dividends thereon, and to hold the same for the satisfaction of any decree that this plaintiff may be decreed to be entitled to recover, and that the said receiver may be also authorized to receive the rents, issues, and profits of the said Mansion House property, in the city of Detroit.

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"(6.) That during the pendency of this action the defendants, the said executors, their agents, servants, and employés, may be enjoined and restrained from selling or disposing of or parting or interfering with the said real property or the said personal property, the shares of stock of the said Eureka Mining Company, until otherwise ordered and directed by this court.

"(7.) That the plaintiff have such other and further relief as this court may deem just, together with the costs of this action."

The answer is a substantial denial and a plea of the statute of limitations and the statute of Michigan as to the Detroit property.

It is seen by an examination of the complaint that in March, 1877, the 3,000 shares of the Eureka Hill Mining Company were received by the decedent and the other property claimed to be held in trust before that time, and the plaintiff made no claim to the decedent of any interest in the shares of stock or in the real estate in Michigan until in the year 1888 and not until after the decedent had become an imbecile and wholly incapable of doing any business, as is fully shown by the evidence in the case, and no sufficient reason is given why the plaintiff slept on his rights all this time and made no claim to the decedent for his interest either in the Detroit property or the mining stock. It is no excuse for his neglect to say that he did not know that dividends were being paid on such stock, and that is the only excuse he gives for not demanding his share of the Detroit property and his share of the mining stock. He could have found out by inquiry, and he says he did not make any. He could have had his share of the stock set off to him, if he was entitled to any, and his interest in the Detroit property deeded to him, if, indeed, he had any interest. This has the appearance of a very stale claim. It is the principle of courts of equity that every case is to be decided on its own merits and is a direct challenge to the conscience of the chancellor, and precedent and authority are only valuable to educate the chancellor in what are the true principles of equity jurisprudence and what rules and doctrines should govern the conscience of the chancellor. His decision should not be governed by his own private notions of right and wrong, but by principles of justice formulated and declared by a long line of decisions of courts of chancery. It is a well-settled principle of equity jurisprudence that courts of equity will not force stale claims.

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This suit is based upon a declaration of trust as follows:

"SALT LAKE CITY, *November* 9, 1872.

"William H. Wood:

"This is to certify that you are entitled to one-eighth interest in the real estate, mining and rolling-mill stocks, and in the $23,587.50 *of* which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7th, less the farm of one hundred and sixty acres which was given to A. A. Griffith. I have received of you
549 twenty shares of Eureka stock, your one-eighth of the one hundred and sixty shares which was given to Messrs. Griffith & Mayhue.

"JOAB LAWRENCE."

The important facts are as follows: In 1872 Wood and Whitney each owned 250 shares of stock in the Eureka Mining Company, which they placed in the hands of the decedent to be sold. He went to Michigan and sold the stock, along with 1,500 of his own, to one E. B. Ward, and received for the stock a good deal of money and the Mansion House property in Detroit. He took the deed to the Detroit property in his own name and this title is still in his heirs. The money he brought home to Salt Lake and $2,000 he divided with Whitney and the plaintiff, and with $23,587.50 he paid off debts of the Eureka Mining Company, with the consent of the plaintiff and Whitney, and took a mortgage or trust deed for the same and for $20,000 additional he claimed to have advanced to the company. Afterwards the mortgage was foreclosed and the property of the company sold to pay the debt, and the decedent became the purchaser and acquired the title to the property of the company. Afterwards a new company, the Eureka Hill Mining Company, was organized, and the decedent deeded to it the property and received therefor 3,000 shares of the new company, excepting a mill which he afterwards sold. This transaction was completed in the spring of 1877. The decedent afterwards sold the mill, and in the year 1879 commenced receiving dividends on the stock and continued to receive the same up to his death, until he had received a large amount of money. The sale of the mill and the receipt of dividends were known to the
550 plaintiff. After 1877 the plaintiff had frequent meetings with the decedent and made no claim on him for his interest in the trust property until in the fall of 1888. In 1886 the decedent's health began to fail and it continued to grow worse until, in 1888, he had become entirely imbecile. After the trade with Ward he (Ward) claimed he had been badly swindled and commenced suits against Lawrence, Whitney, and Wood, the plaintiff, for swindling him. These suits were managed by Lawrence and the expenses thereof paid by him, amounting to somewhere in the neighborhood of $20,000. There is no evidence that Lawrence, after 1877, acknowledged the existence of any trust funds in his hands belonging to the plaintiff. On the contrary, he acted in every particular as if he was the sole and only owner of the 3,000 shares of the Eureka Hill Mining Company and the property in Detroit. It appears, also,

that as early as 1876 Lawrence had repudiated the trust and the plaintiff knew of it, for on July 18, 1876, among other things he said in a letter to Whitney:

JULY 18, '76.

* * * How are things in Utah, and do*es* Lawrence and you get along? You know you and myself have about $17,000 of our money in the mortgage, besides our portion of the Detroit real estate, and, if necessary, have some money left to present my claim in court for a fair and honest judgment. It seems we should commence and claim our rights very soon by a suit if in no other way. All I wish is what is justly due me.

"Yours very truly, WM. H. WOOD."

551 Also, on March 1, 1880, the plaintiff wrote Whitney, among others:

"What course is best to take with Lawrence to bring him to a settlement? Will the law work, this late day? * * * I think something should be done and done promptly and fearlessly and a full exposure made if necessary. * * * No other way but to take the bull by the horns. I fear him not. I closed in one today, and he gave down his milk and came to time.

"Yours in haste, WM. H. WOOD."

These letters clearly show that Lawrence had repudiated the trust prior to that time, and the plaintiff knew it. In 1877 all the trust had been performed, and nothing remained to be done but divide the proceeds; and the plaintiff, knowing all the facts, made no claim on Lawrence until 1888, after he had become imbecile and entirely incapable of doing business. Another fact is that the declaration of trust was not in the hands of the plaintiff, but was found among the papers of Lawrence after his death, and no explanation is made why the declaration of trust was not in the hands of plaintiff, for by its very terms it is his property if it is still in force. This would seem to point to an abandonment or a settlement and end of the trust relation. We think the evidence clearly supports the judgment. It is unaccountable that the plaintiff would have slept in his rights where so many thousand dollars were involved from 1877 to 1888 and until the trustee had become imbecile without making any demand or claim of any kind of or against the alleged trustee, when he was
552 aware in 1880 that the trustee practically denied the trust, considering the further fact that the trustee was financially able to respond to any just claim the plaintiff had against him. In equity a long lapse of time destroys remedies for rights when no explanation is made for the neglect to attempt their enforcement. I think also that the evidence clearly shows that Lawrence had repudiated the trust as early as 1880, and the plaintiff knew of it. I refer to plaintiff's letter to Whitney, dated March 1, 1880. The law is that the statute of limitations begins to run against a claim growing out of a trust from the time the trustee repudiates the trust and the *cestui que trust.* has notice. These views are fully sustained by the

following authorities: Prevost *v.* Gratz, 6 Wheat., 504; Landsdale *v.* Smith, 106 U. S., 391; 1 Sup. Ct. Rep., 350; Hammond *v.* Hopkins, 143 U. S., 273; 12 Sup. Ct. Rep., 418; Philippi *v.* Philippe, 115 U. S., 157; 5 Sup. Ct. Rep., 1181. If it be true therefore that Lawrence denied the obligation of the trust and the plaintiff had notice, the statute of limitations of the Territory of Utah bars the suit. 2 Comp. Laws 1888, sec. 3150. As to the claim of interest in the personal property and in the real estate in Detroit and the rents and issues and profits thereof: *id.*, sec. 3132. So, if I have construed the evidence rightly, this suit is barred both on account of the laches of the plaintiff and the statute of limitations.

As the evidence in the record very clearly supports the decree, it is not necessary to consider the errors assigned as to the findings of facts; but there is another error assigned that should be
553 passed upon. The plaintiff offered himself as a witness and the trial court excluded his testimony as to all matters equally within his knowledge and that of the decedent. This is claimed to be error. We think not. This testimony comes clearly within the terms of the statute. It is not only a claim against an estate, but one for many thousand dollars, and I think the trial court held rightly on that point.

Considering the staleness of the claim, the fact that the claim had not been pressed for more than eleven years, that the decedent practically denied the trust, and which the plaintiff knew as early as 1880, and from that time the statute of limitations began to run, the judgment must be affirmed.

The foregoing opinion is applicable to the case of John N. Whitney against the same defendants. Therefore the judgment in that case is affirmed.

I concur.

ZANE, *C. J.*

MINER, *J.* (dissenting):

I cannot concur with my brethren. In my opinion there is no testimony found in the record of either case tending to show that Lawrence had repudiated the trust or that Wood and Whitney had any notice of such repudiation. To my mind the testimony leads to a contrary conclusion. Nor had the statute of limitations run against either claim at the time of the commencement of these actions.

Endorsed: Title of court and cause. Opinion. Filed January 13th, A. D. 1893. Jos. P. Bache, clerk.

554 In the Supreme Court of Utah Territory.

JOHN N. WHITNEY, Appellant,
vs.
MOYLAN C. FOX, Surviving Executor of the Last Will and Testament of Joab Lawrence, Deceased, Respondent. } Citation.

To the said respondent, Moylan C. Fox, surviving executor of the last will and testament of Joab Lawrence, deceased, and to Bennetty, Marshal and Bradley, his attorneys:

Whereas John N. Whitney has lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of Utah Territory in favor of you, Moylan C. Fox, surviving executor of the last will and testament of Joab Lawrence, deceased, and has filed the security required by law:

You are, therefore, hereby cited and admonished to be and appear before the Supreme Court of the United States, at the city of Washington, D. C., within sixty (60) days of the date hereof, to do and receive what may pertain to justice to be done in the premises.

This citation is allowed in pursuance of an order made in open court on the 14th day of March, 1893, whereby said appeal was allowed, at which time the full bench, including the chief justice, of the supreme court of Utah were present and allowed said appeal.

Given under my hand, at the city of Salt Lake, in the Territory of Utah, this second day of September, 1893.

C. S. ZANE,
Chief Justice of Utah Territory.

Attest my hand and the seal of said court.

[Seal Supreme Court Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

[Endorsed:] Suprme court of Utah. File No., 279. John N. Whitney, app'l't, *vs.* Moylan C. Fox, surviving executor, etc., resp't. Citation. Original. Service of a copy of the within admitted Sept. 5, 1893. Bennett, Marshall & Bradley, att'ys for respondent. Filed in the supreme court Sept. 5, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk.

555 Supreme Court of the United States.

JOHN N. WHITNEY, Appellant,
vs.
MOYLAN C. FOX, Surviving Executor of the Last Will and Testament of Joab Lawrence, Deceased, Respondent.

Appeal from the supreme court of Utah Territory.

Assignment of Error.

I. The court below erred in sustaining the decree of the district court and dismissing the complaint of the said plaintiff and for not awarding him any relief.

II. The court erred in holding that upon the showing of the plaintiff the claim of the said plaintiff was stale and that it — not to be entertained for that reason.

III. The court erred in holding that the said claim of plaintiff was barred by the statute of limitations.

IV. The court erred in holding that there is no evidence that said Lawrence after 1877 did not acknowledge the existence of the trust and in holding that Lawrence had ever denied the existence of the trust.

V. And, further, plaintiff assigns as error the same assignments alleged and set forth in his appeal from the district court to the supreme court of Utah Territory.

556 VI. The evidence was insufficient to justify the decision and finding in the following words, contained in the fourth finding, viz:

"That the remaining twenty thousand (20,000) dollars of said forty-three thousand five hundred and eighty-seven and fifty one-hundredths (—,587.50) dollars secured by said mortgage repre*sentin*g an indebtedness due from said Eureka Mining Company of Utah to said Lawrence individually; that said mortgage was not given to secure in whole or in part any indebtedness due from said company to said plaintiff or to said Wood on account of services rendered by them or either of them to said company."

And the said court erred in deciding and finding as stated in the words so quoted from said fourth finding.

There was express evidence that said Lawrence received the said twenty thousand dollars, and that there was an actual understanding between him, said plaintiff, and William H. Wood that the same should be added to the sum of twenty-three thousand five hundred and eighty-seven and fifty one-hundredths dollars as the mortgage debt, and that said parties should have an interest therein proportionate to the sums included belonging to them respectively.

VII. The evidence was insufficient to justify the finding and decision contained in the concluding words of finding number five, in which the interest of plaintiff in said mortgage is limited to one-eighth of twenty-three thousand five hundred and eighty-seven

and fifty one-hundredths dollars. And said court erred in so finding.

557 VIII. The evidence was insufficient to justify the finding and decision in the following words, contained in the ninth finding:

"That Joab Lawrence claimed and received the dividends thereon and did not at any time recognize any right or interest therein belonging to the plaintiff."

And said court erred in so finding. The evidence shows the contrary of the said finding and every part thereof.

IX. The evidence was insufficient to justify the eleventh finding, and the court erred in so finding. The evidence shows the contrary fact.

X. The evidence was insufficient to justify that part of the thirteenth finding in the following words, viz:

"And that he (plaintiff) had actual knowledge as early as the month of March, 1880, that said Lawrence denied and repudiated any alleged interest or claim in or to any part of said three thousand shares of stock or in the dividends that had been declared and paid thereon or in any part of the property mentioned in the complaint; that the said Lawrence, in part consideration of said conveyance to said Eureka Hill Mining Company, under date of March 1–th, 1877, received, in addition to said three thousand shares of stock of the property, to wit, a quartz mill; that as early as the summer of 1877 the plaintiff had actual knowledge that the said Lawrence had sold and disposed of the machinery of said mill, and was informed of said sale by said Lawrence in person, but he, said plaintiff, did not then nor has he at any time since made an- demand upon the said Lawrence or his representative for any part or

558 portion of the proceeds of said sale, nor did he then nor has he at any time since made any inquiry as to the amount realized by said Lawrence from said sale, although ignorant of the terms thereof."

And said court erred in so finding. There was no evidence relating to the facts so found, or if there was evidence the facts so found are only half the truth, and the other half, if stated, as shown by the evidence, would furnish an explanation which would entitle the plaintiff to a finding in his favor that there was a continuing trust, as claimed in the complaint.

XI. The evidence was insufficient to justify the fourteenth finding, and the court erred in so finding. The only information which the evidence shows that the plaintiff had was information from Lawrence himself recognizing said trust; that the amount received was only about equal to assessments, at the same time saying that the rents from the Detroit property barely suffices to pay taxes and other expenses.

XII. That the evidence was insufficient to justify the fifteenth finding, and the court erred in so finding. The facts are as stated in the explanation in the XI assignment of error.

XIII. The evidence was insufficient to justify that portion of the sixteenth finding in the following words, viz:

"That in November or December, 1885, and after said plaintiff had received actual notice of the receipt by said Lawrence of
559 said fifty-four dollars per share of said three thousand shares of stock, he, said plaintiff, met and conversed with said Lawrence in said Salt Lake City, but made no demand or request of said Lawrence for any part of said dividend."

And the court erred in so finding; said finding contains but half the truth shown by the evidence relating to the time therein mentioned, and if the whole truth were found it would import a recognition of the trust alleged in the complaint.

XIV. The evidence was insufficient to justify that portion of the sixteenth finding in the following words, viz:

"That said plaintiff never made any demand or request of said Lawrence for any portion of said three thousand shares of stock or for any portion of the dividends which had been declared or paid thereon as aforesaid, or any part or portion or interest in said real estate mentioned in said complaint, or the rents, issues, or profits thereof, prior to April 6th, 1888; * * * that plaintiff well knew for many months prior to said demand that said Lawrence had been deprived of his reason and mental faculties."

And said court erred in so finding. The evidence shows a continued recognition of the trust alleged in the complaint from time to time up to said date, April 6th, 1888, and also that at said date Lawrence was not disqualified mentally to do business.

560 XV. The evidence was insufficient to justify that part of the sixteenth finding in the following words, viz:

"That during the latter part of the year 1887 the mind and memory of said Lawrence became so impaired by disease that it was not possible for him to attend to ordinary business matters, and from thence to his death such impairment of his faculties daily increased, so that from the first of the year 1888 until his death he was unable to comprehend any matter of business submitted to him."

And the court erred in so finding. The evidence showed that said Lawrence, though out of health, had intelligence and memory sufficient to qualify him to understand business and the purport of the demand made on him by plaintiff on the 6th day of April, 1888.

561 XVII. And the plaintiff further assigns as errors the action of the court in its ruling upon testimony as follows:

"In this cause, at the hearing thereof, evidence was received of said plaintiff by deposition, subject to the objection of the defendant. Before rendering the findings in said cause I decide and determine as part of the findings that the evidence of the plaintiff as to any matter of fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Wood and said deceased, cannot be received in his favor in this case and is to be excluded."

To which ruling defendant by his counsel except-; which action of the court plaintiff assigns as error.

XVIII. The court erred in sustaining the objection of counsel for

defendant to the question propounded to the witness Hill by counsel for the plaintiff as to the character of the plaintiff Whitney, and also in the action of the court in refusing to permit the plaintiff to prove by Noble, Carn, Lowe, Dyer, Scott, Harkness, Kimball, Culmer, Rayboul, Pickard, McIntosh, and others that they had known the witness Whitney for a period ranging from fifteen to eighteen years; that they were acquainted with his general reputation and character for truth and veracity; that that character was good, and that they would give him full faith and credit on his oath in a court of justice.

562 XIX. The court erred in its action in refusing to allow the plaintiff Whitney to prove by the same persons mentioned in the last above assignment that they knew the plaintiff Whitney and had known him for fifteen or twenty years, and that they knew his general character in reference to honesty and fair dealing, and that his character was good.

XX. The court erred in excluding the testimony of plaintiff, John N. Whitney as taken in the deposition in New York.

XXI. The court erred in excluding the testimony of John N. Whitney, as taken in his own behalf orally upon the stand and in excluding him as a witness on the ground of his incompetency.

XXII. The court erred in sustaining the objection of counsel for defendants to the testimony of L. S. Hills offered to be produced to show the integrity and honesty of the said John N. Whitney.

BROWN & HENDERSON,
Attorneys for Plaintiff.

562½ [Endorsed:] 279. In the supreme court, Utah Territory. John N. Whitney *vs.* Moylan C. Fox, etc. Assignment of error. Filed in the supreme court Sep. 2, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk.

563 In the Supreme Court of Utah Territory.

JOHN N. WHITNEY, Appellant,
vs.
MOYLAN C. FOX, Surviving Executor of the Last Will and Testament of Joab Lawrence, Deceased, Respondent.

Bond upon Appeal of John N. Whitney, Appellant.

Know all men by these presents that we, Arthur Brown and J. G. Sutherland, both of the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto Moylan C. Fox, as the surviving executor of the last will and testament of Joab Lawrence, deceased, in the sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of September, A. D. 1893.

Whereas lately, at the January term of the supreme court of the Territory of Utah, in a cause pending in said court between John N. Whitney and Moylan C. Fox, surviving executor of the last will and testament of Joab Lawrence, deceased, wherein said John N. Whitney was plaintiff and appellant and the said Moylan C. Fox, surviving executor of the last will and testament of Joab Lawrence, deceased, was the defendant and respondent, judgment was
564 rendered against the said plaintiff and appellant, John N. Whitney, affirming the judgment of the district court of the third judicial district of Utah Territory, and the said appellant has since, to wit, on the 12th day of March, 1893, in open court, in the supreme court for Utah Territory, counsel for respondent being present, obtained the allowance of an appeal from the said judgment of affirmance to the Supreme Court of United States:

Now, the condition of the above obligation is such that if the said appellant shall prosecute the said appeal to effect and shall answer all damages and costs in case he fail to make his appeal good, then this obligation to be void; otherwise to be and remain in full force and effect.

JOHN N. WHITNEY,
Per ARTHUR BROWN, *Att'y.* [SEAL.]
ARTHUR BROWN.
J. G. SUTHERLAND. [SEAL.]

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Arthur Brown and J. G. Sutherland, being first duly sworn, each for himself, upon oath says: I am a resident freeholder within the Territory of Utah and am worth the sum specified in the foregoing bond as the penalty thereof over and above my just debts and exclusive of property exempt from execution.

ARTHUR BROWN.
J. SUTHERLAND.

Subscribed and sworn to before me this 2nd day of September, 1893.

[SEAL.] ANTHONY KONENEN,
Notary Public.

565 The foregoing bond is by me approved in open court and in the presence of counsel for respondent this 2nd day of September, A. D. 1893.

C. S. ZANE,
Chief Justice, Utah Territory.

Endorsed: Title court and cause. Bond on appeal. Filed in the supreme court Sept. 2, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk.

566 UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of John N. Whitney, appellant, *vs.* Moylan C. Fox *et al.*, ex'ors of the estate of Joab Lawrence, deceased, respondents, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, assignment of errors, bond on appeal, together with the original citation, all in and of said court in said cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinion, assignment of errors, bond on appeal, is a full, true, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 23rd day of November, A. D. 1893, at Salt Lake City, Utah.

{Seal Supreme Court, Territory of Utah, United States of America.}

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 15,505. Utah Territory supreme court. Term No., 327. John N. Whitney, appellant, *vs.* Moylan C. Fox, surviving executor of the last will and testament of Joab Lawrence, deceased. Filed February 12, 1894.

166-637

166-637.

Office Supreme Court, U. S.
FILED
DEC 29 1896
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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 68.

JOHN N. WHITNEY, APPELLANT,

vs.

MOYLAN C. FOX, SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOAB LAWRENCE, DECEASED.

ARTHUR BROWN,
J. G. SUTHERLAND,
For Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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ARTHUR BROWN,
J. G. SUTHERLAND,
For Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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OCTOBER TERM, 1896.

No. 68.

JOHN N. WHITNEY, APPELLANT,

vs.

MOYLAN C. FOX, SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOAB LAWRENCE, DECEASED.

STATEMENT OF FACTS.

This is an appeal from the supreme court of Utah. September 24, 1889, plaintiff filed his complaint in the nature of a bill in equity to establish the existence of a trust in his favor in the hands of Joab Lawrence for one-eighth of 3,000 shares of stock of the Eureka Hill Mining Company of Utah, and to the dividends which had theretofore been declared paid thereon. The complaint alleges that the plaintiff was the owner in October, 1872, of 250 shares of the stock of the Eureka Mining Company; that it was placed in Lawrence's name and possession to be disposed of by him; that Lawrence did dispose of it, together with 1,500 shares of his own and 250 shares of W. H. Wood, to one E. B. Ward, of De-

troit, Michigan, and received in payment thereof certain manufacturing stocks which were divided on the basis aforesaid, to wit, one-eighth to plaintiff, one-eighth to Wood, and six-eighths to Lawrence; that Lawrence also received some cash, which he expended for the benefit of the company, and in lieu thereof obtained a mortgage executed by the Eureka Mining Company for the sum of $23,587.50, which was a part of the proceeds of said sale and which remained undivided. Lawrence also received certain real estate which remained undivided, situate in Detroit, and known in this complaint as "the Mansion House property."

The complaint also alleges that the mortgage executed by the Eureka Mining Company was for the further sum of $20,000 more, the whole amount of the mortgage being $43,587.50; that this $20,000 additional represented salaries which had been voted to Lawrence, Wood, and plaintiff as officers of said company; that the amount of salary thus voted to plaintiff was $5,500, and that he never received it, but it was placed in said mortgage running to Lawrence. Lawrence received the mortgage as trustee for plaintiff. Proceedings to foreclose the mortgage of $43,587.50 were commenced. The legality of the mortgage was contested by the maker, the Eureka Mining Company, and by its successor, a newly organized mining company known as the Eureka Hill Mining Company; that upon that contest a compromise was made by Lawrence, by and with the assent of the plaintiff and Wood, whereby a decree of foreclosure was taken upon said mortgage, the property sold under it and bid in by a trustee for the Eureka Hill Mining Company, the property conveyed to the Eureka Hill Mining Company, and Lawrence received in payment of the $43,587

mortgage 3,000 shares of stock of the Eureka Hill Mining Company; that he received the same in trust in part for the said plaintiff according to the interest heretofore set forth; that Lawrence never settled or discharged his trusteeship in any manner; that there was never any settlement or payment to plaintiff; that he never delivered any of the stock or dividends to him or never in his lifetime denied this trust. Plaintiff alleges that dividends have been declared to the amount of ninety-four dollars per share, and that the stock is very valuable, worth at least one hundred dollars per share.

Plaintiff further alleges that, after making the trade with Ward Lawrence, executed to plaintiff the following declaration of trust in part recognition of plaintiff's right:

"SALT LAKE CITY, *Nov. 9th*, 1872.

JOHN N. WHITNEY:

This is to certify that you are entitled to one-eighth interest in the real estate, mining and rolling-mill stocks, and in the $23,587.50 of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7th, less the farm of 160 acres which was given to A. A. Griffith. I have received of you twenty shares of Eureka stock, your one-eighth of the 160 shares which was given to Messrs. Griffin and Mayhue.

JOAB LAWRENCE."

That plaintiff still retains possession of the said declaration of trust wholly undischarged; that in the spring of 1888, about April 6th, plaintiff made formal demand on Lawrence, then living, for settlement for his shares of stock, and immediately brought suit in the supreme court of the State of

New York, the said suit being brought jointly by Whitney and Wood against Lawrence. Thereafter Lawrence moved to the State of Utah, and before the said suit came on for hearing Lawrence died, to wit, on or about the 28th day of December, 1888. By reason of that death, and that Lawrence had no property in New York, that suit abated. Defendant was appointed executor and suit was brought against him in Utah. The answer of defendant denies on information and belief the existence of the trust and each of the facts from which it arose; denies the execution of the declaration of trust; alleges that the claim of plaintiff is stale, and that Lawrence was sick several years before his death and before demand made by plaintiff and unable to do business or comprehend anything, and that the suit of plaintiff is barred by the statute of limitations of Utah.

The contentions between the parties on the trial were:

1st. Whether the declaration of trust was executed by Lawrence or was it a forgery.

2d. The ownership of the stock of Eureka M. Co. by plaintiff.

3d. Whether plaintiff knew of the value of the stock of Eureka Hill M. Co., and of the fact that dividends had been declared upon it and of the reasons why he had not made an earlier demand for his property.

4th. Sickness of Lawrence.

5th. Whether there was any inference of repudiation of the trust by Lawrence.

The district court found:

1. The execution of the declaration of trust.

2. The existence of all the facts to constitute the trust, so far as the one-eighth of $23,587.50 and of the Mansion House property.

3. That the claim of plaintiff for salary of $5,500 as part of the $20,000 was not well founded in fact.

4. That plaintiff knew that Lawrence had repudiated the trust before demand had been made upon him.

5. That the claim of plaintiff was stale and barred by the statute of limitations.

The findings also embraced many other things in substance not material, including evidentiary matters, such as letters written from Wood to Whitney and Lawrence to Whitney and other equally evidentiary matters.

The district court also held and ruled that plaintiff could not be sworn as a witness in his own behalf; that the deposition of plaintiff, which had been taken in New York in the New York case while Lawrence was living, could not be read in evidence. The plaintiff was also examined as a witness on the trial and his New York deposition read on the trial, as the court received them both subject to objection, subject to further ruling on the part of the court. (Record, page 97, fol. 180.)

After the case was submitted and considered by the court and before the findings of fact were made, the court excluded the testimony of the plaintiff as a witness, and also

excluded the deposition taken in the New York case (Record, page 27, fol. 56) I quote it here:

"Title of Court and Cause.

"In the above-entitled cause, at the hearing thereof, evidence was received of the said plaintiff, subject to the objection of the defendants. Before rendering the findings in said cause I decided and determine as a part of the findings—

"That the evidence of the said plaintiff as to any matter of fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Whitney and said deceased cannot be received in his own favor in this cause and is to be excluded; to which said ruling the plaintiff, by his counsel, excepts.

"I also determine that the deposition of the plaintiff, John N. Whitney, who brought an action similar to that of the said Wood, which was heard at the same time, which deposition was taken in New York, in a cause in which both this plaintiff and said Wood were plaintiffs against said Joab Lawrence, cannot be received except for the purpose of impeaching the said Whitney, nor any of the evidence of the said Whitney in that said former action, said Whitney being present in court and orally testifying in this action; to which ruling counsel for plaintiff excepts.

"But I determine that the evidence of said Wood, given by deposition in this cause, wherein this plaintiff Whitney is solely the party plaintiff, may be received, and I take that into consideration in rendering the findings in this case; to the admission of which evidence the counsel for the defendants except.

"T. J. ANDERSON, *Judge.*"

This statement is not only incorporated in the statement for new trial and appeal, but is, in fact, a sepa-

rate bill of exceptions. It will be seen that, although excluded, the testimony of Whitney was received as evidence to establish any fact or facts adverse to plaintiff, but not to establish anything favorable to him. An examination of the testimony shows that as to some of the findings there was no evidence at all except that obtained from plaintiff's testimony. The deposition taken is not in the record. If erroneously excluded, the only remedy is to remand the action to the trial court that it may retry it and weigh over again the testimony.

The exception and rulings are fully stated in a bill of exceptions or statement on motion for new trial and appeal.

The assignments of error embrace all the assignments and specifications entered in the supreme court of Utah, but the questions of law are much more limited. The questions of law arise principally upon the exclusion of this testimony of plaintiff, and also as to the presumption arising from the facts, the finding of the trust and the existence of the declaration of trust.

The following are the assignments to be discussed on this argument:

XX. The court erred in excluding the testimony of plaintiff, John N. Whitney, as taken in the deposition in New York.

XXI. The court erred in excluding the testimony of John N. Whitney as taken in his own behalf orally upon the stand, and in excluding him as a witness on the ground of his incompetency.

I. The court below erred in sustaining the decree of the district court and dismissing the complaint of the said plaintiff and for not awarding him any relief.

II. The court erred in holding that upon the showing of the plaintiff the claim of the said plaintiff was stale, and that it was not to be entertained for that reason.

III. The court erred in holding that the said claim of plaintiff was barred by the statute of limitations.

XVII. And the plaintiff further assigns as errors the action of the court in its ruling upon testimony as follows:

"In this cause, at the hearing thereof, evidence was received of said plaintiff by deposition, subject to the objection of the defendant. Before rendering the findings in said cause I decide and determine as part of the findings that the evidence of the plaintiff as to any matter of fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Wood and said deceased, cannot be received in his favor in this case, and is to be excluded."

XVIII. The court erred in sustaining the objection of counsel for defendant to the question propounded to the witness Hill by counsel for the plaintiff as to the character of the plaintiff Whitney, and also in the action of the court in refusing to permit the plaintiff to prove by Noble, Carn, Lowe, Dyer, Scott, Harkness, Kimball, Culmer, Raybould, Pickard, McIntosh, and others that they had known the witness Whitney for a period ranging from fifteen to eighteen years; that they were acquainted with his general reputation and character for truth and veracity, and that that

character was good, and that they would give him full faith and credit on his oath in a court of justice.

XIX. The court erred in its action in refusing to allow the plaintiff Whitney to prove by the same persons mentioned in the last-above assignment, that they knew the plaintiff Whitney and had known him for fifteen or twenty years, and that they knew his general character in reference to honesty and fair dealing, and that his character was good.

XXII. The court erred in sustaining the objection of counsel for defendants to the testimony of L. S. Hills, offered to be produced to show the integrity and honesty of the said John N. Whitney.

Under the rule, we also add all the assignments contained in the record.

ASSIGNMENTS OF ERROR.

I. The court erred in sustaining the decree of the district court and dismissing the complaint of the said plaintiff and for not awarding him any relief.

II. The court erred in holding that upon the showing of the plaintiff the claim of the said plaintiff was stale, and that it cannot now to be entertained for that reason.

III. The court erred in holding that the said claim of plaintiff was barred by the statute of limitations.

IV. The court erred in holding that there is no evidence that said Lawrence, after 1877, did not acknowledge the ex-

I. The court below erred in sustaining the decree of the district court and dismissing the complaint of the said plaintiff and for not awarding him any relief.

II. The court erred in holding that upon the showing of the plaintiff the claim of the said plaintiff was stale, and that it was not to be entertained for that reason.

III. The court erred in holding that the said claim of plaintiff was barred by the statute of limitations.

XVII. And the plaintiff further assigns as errors the action of the court in its ruling upon testimony as follows:

"In this cause, at the hearing thereof, evidence was received of said plaintiff by deposition, subject to the objection of the defendant. Before rendering the findings in said cause I decide and determine as part of the findings that the evidence of the plaintiff as to any matter of fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Wood and said deceased, cannot be received in his favor in this case, and is to be excluded."

XVIII. The court erred in sustaining the objection of counsel for defendant to the question propounded to the witness Hill by counsel for the plaintiff as to the character of the plaintiff Whitney, and also in the action of the court in refusing to permit the plaintiff to prove by Noble, Carn, Lowe, Dyer, Scott, Harkness, Kimball, Culmer, Raybould, Pickard, McIntosh, and others that they had known the witness Whitney for a period ranging from fifteen to eighteen years; that they were acquainted with his general reputation and character for truth and veracity, and that that

character was good, and that they would give him full faith and credit on his oath in a court of justice.

XIX. The court erred in its action in refusing to allow the plaintiff Whitney to prove by the same persons mentioned in the last-above assignment, that they knew the plaintiff Whitney and had known him for fifteen or twenty years, and that they knew his general character in reference to honesty and fair dealing, and that his character was good.

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Under the rule, we also add all the assignments contained in the record.

ASSIGNMENTS OF ERROR.

I. The court erred in sustaining the decree of the district court and dismissing the complaint of the said plaintiff and for not awarding him any relief.

II. The court erred in holding that upon the showing of the plaintiff the claim of the said plaintiff was stale, and that it cannot now to be entertained for that reason.

III. The court erred in holding that the said claim of plaintiff was barred by the statute of limitations.

IV. The court erred in holding that there is no evidence that said Lawrence, after 1877, did not acknowledge the ex-

istence of the trust, and in holding that Lawrence had ever denied the existence of the trust.

V. And, further, plaintiff assigns as error the same assignments alleged and set forth in his appeal from the district court to the supreme court of Utah Territory.

VI. The evidence was insufficient to justify the decision and finding in the following words in the fourth finding, viz:

"That the remaining twenty thousand (20,000) dollars of said forty-three thousand five hundred and eighty-seven and fifty one-hundredths (43,587.50) dollars was secured by said mortgage, representing an indebtedness due from said Eureka Mining Company of Utah to said Lawrence individually; that said mortgage was not given to secure in whole or in part any indebtedness due from said company to said plaintiff or to said Wood on account of services rendered by them or either of them to said company."

And the said court erred in deciding and finding, as stated, in the words so quoted from said fourth finding.

"There was express evidence that said Lawrence received the said twenty thousand dollars, and that there was an actual understanding between him, said plaintiff, and William H. Wood that the same should be added to the sum of twenty-three thousand five hundred and eighty-seven and fifty one-hundredths dollars as the mortgage debt, and that said parties should have an interest therein proportionate to the sums included belonging to them respectively."

VII. The evidence was insufficient to justify the finding and decision contained in the concluding words of finding number five, in which the interest of plaintiff in said mort-

gage is limited to one-eighth of twenty-three thousand five hundred and eighty-seven and fifty one-hundredths dollars, and said court erred in so finding.

VIII. The evidence was insufficient to justify the finding and decision in the following words contained in the ninth finding:

"That Joab Lawrence claimed and received the dividends thereon and did not at any time recognize any right or interest therein belonging to the plaintiff."

And the said court erred in so finding. The evidence shows the contrary of the said finding and every part thereof.

IX. The evidence was insufficient to justify the eleventh finding and the court erred in so finding. The evidence shows the contrary fact.

X. The evidence was insufficient to justify the part of the thirteenth finding in the following words, viz:

"And that he (plaintiff) had actual knowledge as early as the month of March, 1880, that said Lawrence denied and repudiated any alleged interest or claim in or to any part of said three thousand shares of stock or in the dividends that had been declared and paid thereon, or in any part of the property mentioned in the complaint; that the said Lawrence, in part consideration of said conveyance to said Eureka Hill Mining Company, under date of March 1, 1877, received in addition to said three thousand shares of stock of the property, to wit, a quartz mill; that as early as the summer of 1877 the plaintiff had actual knowledge that the said Lawrence had

sold and disposed of the machinery of said mill and was informed of said sale by said Lawrence in person, but he, said plaintiff, did not then, nor has he at any time since, made any demand upon the said Lawrence or his representative for any part or portion of the proceeds of said sale, nor did he then, nor has he at any time since, made any inquiry as to the amount realized by said Lawrence from said sale, although ignorant of the terms thereof."

And the said court erred in so finding. There was no evidence relating to the facts so found; or, if there was evidence, the facts so found are only half the truth, and the other half, if stated, as shown by the evidence, would furnish an explanation which would entitle the plaintiff to a finding in his favor that there was a continuing trust, as claimed in the complaint.

XI. The evidence was insufficient to justify the fourteenth finding, and the court erred in so finding. The only information which the evidence shows that the plaintiff had was information from Lawrence himself recognizing said trust; that the amount received was only about equal to assessments, at the same time saying that the rents from the Detroit property barely suffices to pay taxes and other expenses.

XII. That the evidence was insufficient to justify the fifteenth finding, and the court erred in so finding. The facts are as stated in the explanation in the XI assignment of error.

XIII. The evidence was insufficient to justify that portion of the sixteenth finding in the following words, viz:

"That in November or December, 1885, and after said plaintiff had received actual notice of the receipt by said Lawrence of said fifty-four dollars per share of said three thousand shares of stock, he, said plaintiff, met and conversed with said Lawrence in said Salt Lake City, but made no demand or request of said Lawrence for any part of said dividend."

And the court erred in so finding. Said finding contains but half the truth shown by the evidence relating to the time therein mentioned, and if the whole truth were found it would import a recognition of the trust alleged in the complaint.

XIV. The evidence was insufficient to justify that portion of the sixteenth finding in the following words, viz:

"That said plaintiff never made any demand or request of said Lawrence for any portion of said three thousand shares of stock, or for any portion of the dividends which had been declared or paid thereon as aforesaid, or any part or portion or interest in said real estate mentioned in said complaint, or the rents, issues, or profits thereof prior to April 6, 1888; that plaintiff well knew for many months prior to said demand that said Lawrence had been deprived of his reason and mental faculties."

And the said court erred in so finding. The evidence shows a continued recognition of the trust alleged in the complaint from time to time up to said date, April 6, 1888, and also that at said date Lawrence was not disqualified mentally to do business.

XV. The evidence was insufficient to justify that part of the sixteenth finding in the following words, viz:

"That during the latter part of the year 1887 the mind and memory of said Lawrence became so impaired by disease that it was not possible for him to attend to ordinary business matters, and from thence to his death such impairment of his faculties daily increased, so that from the first of the year 1888 until his death he was unable to comprehend any matter of business submitted to him."

And the court erred in so finding. The evidence showed that said Lawrence, though out of health, had intelligence and memory sufficient to qualify him to understand business and the purport of the demand made on him by plaintiff on the 6th day of April, 1888.

XVII. And the plaintiff further assigns as errors the action of the court in its ruling upon testimony as follows:

"In this case, at the hearing thereof, evidence was received of said plaintiff by deposition, subject to the objection of the defendant. Before rendering the findings in said cause, I decide and determine as part of the findings that the evidence of the plaintiff as to any matter of fact occurring before the death of Joab Lawrence, deceased, and equally within the knowledge of said Wood and said deceased cannot be received in his favor in this case, and is to be excluded."

To which ruling defendant, by his counsel, excepted; which action of the court plaintiff assigns as error.

XVIII. The court erred in sustaining the objection of counsel for defendant to the question, propounded to the witness Hill by counsel for the plaintiff, as to the character

of the plaintiff Whitney, and also the action of the court in refusing to permit the plaintiff to prove by Noble, Carn, Lowe, Dyer, Scott, Harkness, Kimball, Culmer, Raybould, Pickard, McIntosh, and others that they had known the witness Whitney for a period ranging from fifteen to eighteen years; that they were acquainted with his general reputation and character for truth and veracity; that that character was good, and that they would give him full faith and credit on his oath in a court of justice.

XIX. The court erred in its action in refusing to allow the plaintiff Whitney to prove by the same persons mentioned in the last-above assignment that they knew the plaintiff Whitney and had known him for fifteen or twenty years, and that they knew his general character in reference to honesty and fair dealing, and that his character was good.

XX. The court erred in excluding the testimony of plaintiff, John N. Whitney, as taken in the deposition in New York.

XXI. The court erred in excluding the testimony of John N. Whitney, as taken in his own behalf, orally, upon the stand, and in excluding him as a witness on the ground of his incompetency.

XXII. The court erred in sustaining the objection of counsel for defendant to the testimony of L. S. Hills, offered to be produced to show the integrity and honesty of the said John N. Whitney.

BRIEF FOR APPELLANT.

I.

The deposition of Whitney taken in New York is not in the record. If erroneously excluded, the only remedy is to remand the case to the trial court, which is the only tribunal having jurisdiction of issues of fact, with directions to receive and consider this testimony. The findings of fact by the trial court have been frequently held in this Court to be conclusive here.

Bear River Canal Co. *vs.* Garland, 164 U. S., 18, and cases there cited.

Mammoth Mining Co. *vs.* Foundry Co., 151 U. S., 447, and cases there cited.

Idaho & Oregon L. Co. *vs.* Bradley, 132 U. S., 514.

The logical and necessary sequence of this rule is that only the trial court can determine facts. If the court did not weigh the deposition mentioned, but rejected it, from his mental consideration, then the only method of finding what effect should be given to that testimony is to return it to a trial court. It appears here that this testimony and deposition were rejected. The opinion of the judge is exactly like the verdict of a jury. No appellate court can take the place or perform the duty of a tribunal especially designated to try facts. Failure to find new facts by the Supreme Court or to make new rulings was the adoption and indorsement of those rulings and findings of fact made by the trial judge (Idaho & Oregon L. Co. *vs.* Bradley, 132 U. S., 514; String-

fellow *vs.* Caine, 99 U. S., 610), and the contention here is upon those findings and the rulings of the trial judge during the trial.

The first question arising here is, "Was the plaintiff a competent witness?" The language of the statute of Utah, section 3876, is as follows:

"All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religous belief; although in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility."

Section 3877 is as follows:

"The following persons cannot be witnesses" * * *

"3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person, and equally within the knowledge of both the witness and the deceased person."

This statute was copied from that of California, section 1880, Deering's Code. The language of the excepting clause there is identical with that statute and which received a

construction in that State in the case of Myers *vs.* Reinstein, 67 Cal., p. 89. It is there held that, to enable the *cestui que trust.* to establish his claim to the trust property, his testimony may be received, although the trustee is dead. The statute differs from that in many other States. The limitation as to nature of claim is not found in the statutes of a majority of the States or in the Federal statutes.

We do not make a claim or demand against the estate of Joab Lawrence. This property never belonged to his estate. It never belonged to him. To determine on the admissibility of this testimony that the property was his and belonged to his estate is to adjudge the cause before the evidence has been received. This testimony of Whitney should be considered and weighed in deciding the question whether it was the estate of Lawrence or his property. The argument on the subject is fully stated in the California case of Myers *vs.* Reinstein. In that case the plaintiff, claiming as *cestui que trust.* in what he alleged was a resulting trust, brought suit to establish that resulting trust in a parcel of land—exactly such a suit as we are bringing here. When the suit came on for trial the trustee was dead and the Court say (pages 91, 92):

"The question remains for determination, was Collins a competent witness as to the transactions objected to? If he was not, the court committed an error affecting materially the interests of defendants. If he was competent, there was no error. The objection is based on section 1880 of the Code of Civil Procedure. That section, so far as relates to the question before us, is as follows:

'The following persons cannot be witnesses * * * (3.) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is pros-

ecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person as to any matter of fact occurring before the death of such deceased person.'

" We are of opinion that the witness was competent. The " action was not on a claim or demand against the estate " of Reinstein. The plaintiff asserted that the interest in " the land sued for constituted no part of M. Reinstein's " estate, but was held in trust by Reinstein for Collins " or his assigns, and after his death by the defendants, " his devisees and successors. The defendants asserted " that no such trust existed, but that Reinstein, their " devisor, held the lands as his own estate, and that they " had succeeded to his right. The very question to be " determined here was whether the interest sought to " be recovered was a part of Reinstein's estate or not. " If it was a part of his estate, then no trust existed; " he held it in trust in his lifetime, and the interest passed " to his successors to the legal title, clothed with the trust. " *To hold that the claim or demand here attempted to be en-* " *forced was a part of the estate, and thus render the witness* " *incompetent, would be to determine in advance the very ques-* " *tion to be determined on the trial of the action. By so holding* " *we would assume the very question to be tried and settled by* " *the contestation between the parties. This we are not allowed* " *to do.* It may be admitted, though we are not now willing " to concede it, that it would be, as an abstract question, " unjust that Collins should be allowed to testify in the cause " while Reinstein's lips are sealed by death; but this was a " question for the consideration of the legislature, to be " settled by it, and it has not, as we construe the language

"used by it in framing the section invoked, thought proper "to go so far as to apply the rule prescribed by the section "to all actions brought against an executor or administra- "tor. The section of the statute in New York is much "broader in its language (section 399 of the New York Code "of Procedure; see Vorhies' Code, ed. 1870, p. 626) than "that of this State. Our attention has been called to no "act or case construing it in any other State where the form "of words used in the statute is the same as that adopted "in section 1880 of the Code of Civil Procedure."

II.

If the testimony of Whitney as given orally on the stand was not proper and was properly ruled out, then the next question is as to the deposition taken in New York. Does that stand on any different footing? In Utah the statute of New York is presumed to be the same as that of Utah.

Hill *vs.* Grigsby, 32 Cal., 55.

Morris *vs.* Harris, 15 Cal., 254.

It is not necessary for us, therefore, to introduce preliminary proof of the statute of New York. The Utah statute does not exclude the testimony of a witness because his adversary is sick, even if sick to the extent of mental disability or dementia. This deposition was taken when Lawrence was alive in New York. Plaintiff was examined by his attorneys, Alexander & Green, and cross-examined by Joseph A. Choate, attorney for Mr. Lawrence. Had that action proceeded, the deposition could have been read on that trial. It was admissible in that case, even if Lawrence died ~~after~~ before

trial. It is equally admissible in any other trial involving the same subject-matter between the same parties.

Galbraith *vs.* Zimmerman, 100 Pa. St., 376.
Commins *vs.* Hatfield, 80 N. Y., 267.
Pratt *vs.* Patterson, 81 Pa. St., 117.
Armitage *vs.* Snowden, 41 Md., 123.
Evans *vs.* Reed, 78 Pa. St., 415.
1 Wharton on Ev., 3 ed., sec. 477.

In Galbraith *vs.* Zimmerman the facts are similar to those in this case. Galbraith had formerly brought suit for specific performance of a land contract, which was dismissed on the ground that plaintiff had an adequate remedy by ejectment. In the specific-performance case the testimony of P. M. O'Connell, who was interested with the plaintiff, was taken by deposition during Zimmerman's life. As to that the court say:

"We are very clear that there was error in the rejection of O'Connell's deposition. At the time it was taken he was a competent witness, notwithstanding his interest, and under the well-settled rule in such cases the testimony then taken could be given in evidence at the subsequent trial. The former controversy was practically between the same parties and in relation to the same subject-matter. In that proceeding O'Connell's testimony was taken. The objection to his competency on account of his interest in the suit could not have prevailed if it had been then made. At the time of the trial of the present action, Zimmerman being dead and the witness interested against him, the objection on the ground of interest necessarily prevailed and he was properly excluded. But when his testimony, taken when he was competent, in a proceeding relative to

the same subject-matter and practically between the same parties, was offered, there was no legitimate reason for its exclusion. The learned court below admitted the deposition of the adverse party, Galbraith, taken in the same proceeding, after having rejected him as a witness on the trial, but, for some reason which is not clear to us, rejected the deposition of O'Connell, who was not a party, but merely an interested witness. The following cases very clearly establish the competency of the rejected deposition: Pratt *vs.* Patterson, 31 P. F. S., 114; Evans *vs.* Reed, 28 P. F. S., 415, and 3 Norr., 254; Hays' Appeal, 10 Norr., 265. *The test of present admissibility is the competency of the testimony at the time it was given.* Thus in Hays' Appeal, *supra*, we said, on page 268, 'When the plaintiff testified he was undoubtedly a competent witness, and nothing that occurred thereafter would have justified the court or master in excluding his testimony.' In 31 P. F. S., on p. 117, Mr. Justice Mercur, speaking of Evans *vs.* Reed, said: 'There it was said *if the deposition of a party be duly and regularly taken so as to be admissible in evidence in a pending case it is very clear that it would be admissible in a subsequent suit between the administrators of the parties involving the same subject-matter.*' Here it is a subsequent suit, tried after the death of one of the parties, and involving the same subject-matter. The very case assumed there substantially exists here. In each case the testimony was not only admissible when taken, but had actually been given in evidence."

As this case quotes the former Pennsylvania cases, further quotations from them are unnecessary. It will be seen in many of them that it was the deposition of the party himself that was offered after his adversary was dead. The same rule holds in the New York case and in the Maryland case. The court say in the Maryland case, Armitage *vs.* Snowden, at p. 123:

"The objection to the testimony of the appellant cannot be sustained. The admissibility of testimony depends upon the competency of the witness at the time he testifies, and cannot be affected by what may happen afterwards. When the testimony of Armitage was taken Knell, the testator, was alive, and under the Evidence Acts of 1864, chap. 109, and 1868, ch. 116, he was a competent witness. The fact that Knell died before the hearing cannot render the testimony thus taken inadmissible."

All facts which exclude the testimony of a witness must exist at the time the testimony is taken and must be shown at the time it was excluded.

Held *vs.* Hilton, 1 Southern Reporter, 340.

The clause of the statute enabling parties and other interested persons to testify is entitled to a liberal construction. This has been universally held by all courts on that subject. The clause excluding the testimony should receive a strict construction.

Alabama G. Life Ins. Co. *vs.* Sledge, 62 Ala., 566.
Kumpe *vs.* Coons, 63 Ala., 455.
Potter *vs.* National Bank, 102 U. S., 163.

III.

PLAINTIFF IS ENTITLED TO A DECREE ON THE FINDINGS OF THE TRIAL COURT.

The first to the sixth findings show that Joab Lawrence was the trustee of these plaintiffs in an express trust. By the fourth and sixth findings it was found that Lawrence was their trustee severally of an eighth interest in $23,587.50

of the mortgage debt secured by the mortgage of the Eureka Mining Company to Tracy, in which Lawrence was named as the creditor; that Lawrence gave the plaintiffs, November 9, 1872, a declaration of trust in writing to that effect.

Neither party contests the fact so affirmatively found. It is conclusively established in the case. The findings show historically how the plaintiffs became entitled to those interests. The statement does not profess to contain the evidence of these facts, though much of it is incidentally introduced in the statement for other purposes. The trust had its inception in a transaction between Lawrence and E. B. Ward, in which Lawrence, acting for himself and as agent and trustee of these plaintiffs, sold Ward 2,000 shares of the capital stock of the Eureka Mining Company.

The evidence shows that the trust as created was a continuing trust and continued until the death of Lawrence. He had not performed, satisfied, or settled it.

By the trust Lawrence held the property for himself and these plaintiffs. They severally had an equitable title to part of it. The legal title to their part was in him for them as owners. The only way in which he could discharge his trust was by conveying to them or selling to third persons and dividing with them the proceeds or by obtaining their conveyance in himself.

Seymour *vs.* Freer, 8 Wall., 202.

It is to be observed that the answer does not allege performance of this trust or any mode of discharge. The plaintiffs had an acknowledged equitable interest in the Detroit lot, and also in the debt secured by the mortgage for which the stock in the Eureka Hill Mining Company was

obtained. Both were valuable. Lawrence was a business man; he had a comprehension of what was necessary to fortify and protect his own interests. Had he settled the trust so as to make himself the absolute owner of the trust property, he would have exacted a release from the beneficiaries in some form. Defendant Fox was his son-in-law and one of his executors. He was a witness on the trial. Had there been evidence among Lawrence's papers of any such transaction, Fox knew it. His silence in the answer and as a witness is very significant that no such transaction took place.

A purchase of the trust property by Lawrence would not be regarded with favor in a court of equity.

1 Perry on Trusts, secs. 194, 200, 209.
Michoud *vs.* Girod, 4 How., 503.

Such a purchase is so obnoxious that it would not be presumed. On the contrary, the continuance of the trust is presumed. Greenleaf says:

"When the existence of a person, a personal relation, or a state of things is once established or proved, the law presumes that the person, relation, or state of things continued to exist as before until the contrary is shown or until a different presumption is raised from the nature of the subject in question.

1 Greenleaf's Ev., sec. 41.
2 Wharton's Ev., sec. 1284.
2 Perry on Trusts, sec. 886.
Lewis *vs.* Hawkins, 23 Wall., 119–126.

Under the Code of Procedure in California and Utah the findings of fact must be of ultimate facts. By that is meant

the final statement or conclusion of facts, not the mere recital of some specific bit of evidence. It should be stated either in the language of the complaint or answer or the issue formed or the substance of the issue, and it must be directly upon that issue. The first nine findings of fact in this case conform to the rule; they are findings upon ultimate facts, upon issues in the case; they are the decision of those issues. Take these nine findings alone without the remainder, and they entitle this plaintiff not to what he asks, but to a recovery of a part of what he asks; they entitle him to a recovery of one-eighth of the stock represented by $23,587.50 and one-eighth of the property in Detroit known as the Mansion House property. This would give him 200 shares of the stock, worth $194 per share, and an undivided one-eighth of the Mansion House property. These nine findings are the only ones that answer to the issues. The defendant did not allege any payment, discharge, settlement, disclaimer, or repudiation of any trust. There was no ENDING of the trust according to the answer, and ending of the trust in any way was not within the issue. There could be no ending, because the answer says there was no beginning. The question of settlement or discharge of the trust was not submitted to the court. On the contrary, the defense made issue with the plaintiff in this case upon the existence of the trust. They denied the genuineness of the declaration of the trust. The first issue—the main issue tried in this case—was, "Was the declaration of trust a forgery?" They cast their fortune with the question of its existence or non-existence. Testimony was taken at great length upon that question, not appearing in the record, however, because there was no occasion for this

plaintiff to review it, as the finding of the court was with the plaintiff. There was issue also upon the facts which created the existence of the trust. The plaintiff had alleged that he had been the owner of 250 shares of the old Eureka Mining Company; that it was given to Lawrence in trust to sell. Issue was taken upon that and found against the defendants. Issue was taken upon the fact that the $23,587.50 represented in part the stock sold by Lawrence, and that issue was found against the defense and for the plaintiff, the question thus being as to the existence of the trust and declaration of trust and facts creating it. It could not be upon the question of settlement of it. The defense could not and did not at the same time deny the trust and allege a settlement of a trust. That would be contradictory. They were compelled to take one horn of the dilemma, either admit the trust and the declaration and allege a settlement, which is an affirmative fact they would have to prove, or deny the existence of facts creating the trust. They chose the latter. They denied the existence of the trust. In the New York case, which had been at issue and abated by the death of Lawrence, they had taken the other horn of the dilemma. They had alleged that it was settled, forming their answer upon the testimony of Mr. Bennett that Lawrence said, "It had been settled, settled, settled" (fol. 126).

But here the issue was only, Did the trust ever exist? In the first nine findings the court has decided the facts for the plaintiff with the single exception as to the salary of $5,500. There are no other findings that detract from the force of the first nine findings, and upon them we are entitled to a recovery.

Finding 10 relates solely to Mr. Wood and had reference to his case and not to the plaintiff.

Findings 10 and 12 should not be considered at all by this Court. They are not findings of fact in any sense of the word. They do not come within any rule that would permit them to be considered. They are mere statements of the existence of certain letters from which inferences might or might not be drawn. They are not within the issue. Findings of a court must contain the elements of a special verdict of a jury, and mere statements of fact in such findings will be disregarded.

Breeze *vs.* Doyle, 19 Cal., 102.
Kahn *vs.* Smelting Co., 2 Utah, 381.
Matthews *vs.* Kinsell, 41 Cal., 512.
Ornbaum *vs.* His Creditors, 61 Cal., 455.

Findings that contain merely probative facts and not ultimate facts are insufficient to support a judgment.

Caveny *vs.* Hale, 49 Cal., 556.
Bull *vs.* Bray, 89 Cal., 292.
O'Connor *vs.* Thrasher, 53 Cal., 535.
De Celis *vs.* Porter, 65 Cal., 10.

Neither findings 10, 12, 13, or 14 are findings upon any issue. They are outside of the issue. They are not a conclusion on any matter in dispute between the parties. As such, they should be disregarded. Findings of fact not in dispute are disregarded.

Marks *vs.* Sayward, 50 Cal., 60.
Commissioners *vs.* Barnhart, 98 Cal., 199.

Finding 11 in no way prevents plaintiff's recovery or authorizes any conclusion of law preventing plaintiff's recovery. The mere fact that plaintiff did not claim or demand Lawrence's dividend does not show he was not entitled to a recovery, if, as the former findings declare, he was the *cestui que trust.* and Lawrence was the trustee. Finding 12 is a mere evidentiary fact of no sort of account, and evidently was a finding to apply to the Wood case, only it must be remembered that these findings were made in two cases which were heard and tried at the same time—the one of Wood against Lawrence and the one of Whitney. While they are alike, they are not identical; it is the admission of Wood and not the admission of Whitney.

Finding 12 is entirely immaterial as to this case. Wood's case is not now before the Court. He must stand upon his own merits. Whitney's case is before the Court. No statement of fact is found in finding 12 which should put Whitney upon his knowledge or diligence.

Finding 13 is not the finding of any fact which prevents a recovery by this plaintiff. As was said in another part of this brief, the finding that the plaintiff knew that Lawrence had repudiated any interest is immaterial when Lawrence had not repudiated any interest or trusteeship. There is no allegation in the answer that Lawrence either did repudiate or disclaim his trusteeship. He denied that it ever existed. He could not repudiate that which never existed, and there was no allegation of such repudiation, and a finding upon that subject would be utterly immaterial. Findings on matters not in issue will not be considered in the appellate court or weighed in determining the sufficiency of the decree.

The findings of fact which seek to establish the statute of limitations are to be found in 14, 15, and 16. The finding in 14 that the plaintiff knew that the Eureka Hill Mining Company declared a dividend of a dollar a share in 1880 would not start the statute of limitations as to the stock itself or as to subsequent dividends. It would not show that the plaintiff was required to at once demand a settlement. A dividend of a dollar on 200 shares would amount only to $200 on all the shares that he claimed, and the mere fact that he failed to demand payment of that money would not show that he relinquished his right to consider Lawrence his trustee or show that Lawrence had disclaimed being trustee. To make a disclaimer on the part of Lawrence some affirmative positive act must be shown to have been done by him.

All the findings contained in 15 and 16 may well have been true, and yet the plaintiff entitled to recover in this action. They simply show that the plaintiff was put upon his diligence in December of 1885, and that in the spring of 1888 he deemed it necessary to go to New York, hunt up his trustee, who had absented himself almost continuously from the fall of 1885 from the Territory of Utah, and make demand and enforce his claim.

The first conclusion of law upon this finding of fact is incorrect. Joab Lawrence was not at the time of his death the owner, free of all trusts in favor of the plaintiff, of the property described in the complaint. He held it subject to the trust stated in the first nine findings.

There was nothing to justify the conclusion of the court in the fourth conclusion that the plaintiff's claim was stale, or that it was barred by delay, and there was nothing to

justify the court in its conclusion of law that the plaintiff's claim was barred by the statute of limitations.

The court's third conclusion of law is erroneous that this suit was barred by section 201 of the practice act, which reads as follows:

"Any action for relief not heretofore provided for must be commenced within four years after the cause of action shall have accrued."

No suit begins to run against a trustee until after the disclaimer. There is no finding here that Lawrence ever repudiated his trust or disclaimed his trust more than four years before the commencement of this suit, in 1888, or even before his death, on December 28, 1888. In fact, there is no finding that he ever disclaimed or repudiated the trust. There could be no such finding because there was no issue upon that question. The defence never pretended that he repudiated his trust or disclaimed it. They denied that it ever existed, and the court found against them upon it.

The contention that there were laches on the part of these plaintiffs because they did not demand the conveyance of a part of the real estate and part of the stock and inquire after dividends has no force. Time does not run against an express trust. During any time that runs the beneficiaries have a right to repose on the presumption of the trustee's loyalty to them. The law raises this presumption.

1 Greenleaf on Evidence, sec. 40.
2 Perry on Trusts, sec. 850.
1 Pom. Eq., sec. 420.

It is a natural confidence. His possession began in an acknowledgment of the beneficiaries' rights and in a duty voluntarily assumed to promote them; it will always continue subordinate to those rights. His possession is the possession of the beneficiaries. A trustee cannot make his possession adverse except by a distinct and unequivocal declaration or notice to that effect to the *cestui que trust.*, and that he intends to hold in a hostile character.

2 Perry on Trusts, secs. 803–850–869, and cases cited.
Prevost *vs.* Gratts, 6 Wheat., 481–497.
Lewis *vs.* Hawkins, 23 Wall., 119, 126.
Seymour *vs.* Freer, 8 *id.*, 202.
Speidel *vs.* Henrici, 120 U. S., 377, 386.
R. R. Co. *vs.* Durant, 95 *id.*, 576.
Oliver *vs.* Platt, 3 How., 411.
Hurst *vs.* Pujol, 44 Cal., 235.
Jones *vs.* Throckmorton, 57 *id.*, 368.
Partridge *vs.* Wells, 30 N. J. Eq., 176.
Bacon *vs.* Rines, 106 U. S., 99.
Gisborn *vs.* Charter Oak, 142 U. S., 218–338.

If a trustee claims adversely and sets up the lapse of time as a defence he has the burden of proof.

Lewis *vs.* Hawkins, 23 Wall., 126.

This means that he must prove that he destroyed the confidence in which the law authorizes the beneficiary to repose. He must unequivocally inform him that the trust is repudiated. The information that will set the time running must be given to the beneficiaries by the trustee.

Pom. Eq., secs. 902–904–1077.

The beneficiary is not bound to enquire.
2 Perry on Trusts, sec. 850.

A resting by the beneficiary in this confidence is not laches. Omitting to make a demand before he is informed that his trustee is disloyal to him, before the trustee has given unequivocal notice of repudiation, is not sleeping on his rights.

According to the evidence in this case and the undisputed findings 1 to 6, inclusive, Lawrence became the trustee of these plaintiffs, taking their interests in his name.

As he merely kept silent and gave no such notice to the plaintiffs, this finding is not only unsupported by the evidence, but destitute of point or significance.

It is immaterial to the purpose of putting the beneficiary on diligence how perfidious is the trustee in his thoughts and secret acts. They are only bound to treat him as an adversary after he has informed them that he is such.

The 13th, 14th, and 15th findings in both cases state the notice or knowledge the plaintiffs had.

They had actual knowledge of the conveyance to the Eureka Hill Mining Company soon after the same was made and of the terms on which the same was made.

This finding is true and is not excepted to. They knew that compromise was made; it was made with their consent. The conveyance in exchange for the stock was a legitimate step in the execution of the trust. The stock was held by Lawrence as he held the mortgage and in pursuance of that continuing trust.

They had actual knowledge as early as the month of March, 1880, that Lawrence denied and repudiated any al-

leged claim of plaintiffs to any of the stock or dividends or the real estate.

This finding is remarkable. It finds that plaintiff had knowledge in 1880 of a fact not found to be a fact. It is not found that Lawrence had so "denied and repudiated." Is this a finding of such denial and repudiation and of these plaintiffs' actual knowledge of it? The fact is one thing and knowledge of it is another.

A letter from Wood to Whitney is found in the 12th finding dated March 1, 1880. The court below states the probative fact in that finding and that conclusion or ultimate fact in the 13th.

Wood addresses a letter to Whitney; it is a communication between these plaintiffs. Wood was impatient to realize and his repinings are put in a letter to Whitney. He refers to no action by Lawrence; no representation by him. He wants to know "what he intends to do;" he has not learned; he wants a settlement. But the time has not come for that; the trust is not fulfilled. Whitney, doubtless, reminded him of that and the subject was dropped.

That letter is all this finding has to rest on. It warrants no such conclusion. The twelfth finding, being matter of evidence, will be disregarded.

James *vs.* Williams, 31 Cal., 211.
Pio Pico *vs.* Cuyas, 47 *id.*, 174–178.
Biddle *vs.* Brixzolara, 56 *id.*, 374.

There is no evidence whatever that Lawrence ever denied the interest of these plaintiffs or repudiated the trust.

The law requires an unequivocal notice to the beneficiaries,

and nothing appears to warrant the inference of such a notice.

The fourteenth and fifteenth findings are that in 1881 the plaintiff knew of $1 per share, and in 1886 that $54 per share altogether had been declared in dividends.

These findings are of no value upon any issue in the case. They show simply that these plaintiffs obtained information to which they were entitled from Lawrence. His failure to divide the dividends and pay over something to the plaintiffs had no effect to determine the trust or to prove that Lawrence claimed them as his own. Lawrence held the dividends as he did the stock.

In Crisfield *vs.* State, 55 Md., 195, the court said:

"The fact that money due to a *cestui que trust.* is allowed to remain in the hands of the trustee, with the consent of the *cestui que trust.*, does not change the nature of the debt itself. It still remains a debt due from the trustee in his character as trustee."

The eleventh, fourteenth, and sixteenth findings negative any demand for division of the trust property until the 6th of April, 1888.

At that time it was proper to ask for a settlement, for Lawrence's health and mind were so impaired that he was not able or qualified to complete the trust. Before that disability came to him, in the latter part of 1887 (see finding 16, Ab., p. 291) this continuing trust had not been performed, but when he lost his capacity to manage the business it was necessary to determine the trust, and the beneficiaries took the initiative for that purpose.

No demand was due from them before, for on a continu-

ing trust a demand could serve no other purpose than a request to do the very acts the trustee is presumed to be doing.

The demand made was reasonable, and these suits became necessary in consequence of Lawrence's death and the refusal of his executors to respond to the plaintiff's reasonable demand.

Upon the findings as made, plaintiff is entitled to a decree for 200 shares of stock of Eureka Hill Mining Company and dividends thereon.

ARTHUR BROWN,
J. G. SUTHERLAND,
For Appellant.

166-637

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166-637.

IN THE

Supreme Court of the United States.

October Term, 1896.

WILLIAM H. WOOD, Appellant (No. 56), and
JOHN H. WHITNEY, Appellant (No. 68),

vs.

MOYLAN C. FOX, Surviving Executor of the Last Will and Testiment of Joab Lawrence, deceased, Appellee.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Brief on behalf of the above named Appellee

By JEREMIAH M. WILSON,
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IN THE

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MOYLAN C. FOX, Surviving Executor of the Last Will and Testament of Joab Lawrence, Deceased. } No. 68.

Appeals from the Supreme Court of the Territory of Utah.

Brief on Behalf of the Above-Named Appellee.

Under stipulation of counsel filed in this court, the Record in the case of John N Whitney, appellant, only has been printed, the case of William H. Wood, appellant, to abide by the decision of the court in the Whitney case, the questions involved and the Records in the two cases being substantially the same.

Pleadings.

The bill of complaint herein was filed in the District Court, Third Judicial District, Utah Territory, on the 24th of September, 1889, against the estate of Joab Lawrence, deceased, for the purpose of establishing a trust in favor of plaintiff in certain real estate and stock therein described, and for an accounting for accumulations from said alleged trust property, etc. (*R., pp. 1–9.*)

The answer is a substantial denial and a plea of the statute of limitations of the Territory of Utah and of the State of Michigan. (*R., pp. 9–16.*) Trial was had before the court, sitting without a jury, and, upon the findings of fact and conclusions of law by the court (*R., pp. 17–23*), decree was entered in favor of defendants January 12, 1891. (*R., pp. 23–24.*)

Plaintiff appealed to the Supreme Court of the Territory of Utah, assigning, as error, that the evidence was insufficient to support the findings and judgment of the court; and further, that the trial court erred in its admission and rejection of testimony against the objection of plaintiff. (*R., pp. 295–8; 300.*) Said appeal coming on for trial in the said Supreme Court, the judgment of the District Court was affirmed January 13, 1893. (*R., pp. 301–310.*)

From said judgment and decree of affirmance, plaintiff appealed to the Supreme Court of the United States. (*R., p. 311.*)

The assignment of errors is set forth in the Record. (*R., pp. 312–315.*)

Statement of Case.

This action was brought to enforce an alleged trust in favor of plaintiff, the appellant in this court, under which it is claimed that Joab Lawrence, deceased, at the

time of, and long prior to, his death, held certain shares of stock in the Eureka Hill Mining Company, together with the dividends which had from time to time been declared thereon and paid to the said Lawrence, and also certain real estate, particularly mentioned and described in the bill of complaint.

The *facts* in the case, as found by the trial court, are, substantially, as follows:

1. That, on and prior to October 7, 1872, plaintiff was the owner of 250 shares, and said Lawrence the owner of more than 1,500 shares of the capital stock of the Eureka Mining Company of Utah; and that, prior to said date, plaintiff delivered to said Lawrence certificates representing his 250 shares of said stock, to be disposed of for the joint benefit of plaintiff and said Lawrence. (*Findings I and II, R., p. 17.*)

2. That on the date aforesaid, the said Lawrence disposed of 1,500 shares of his own and said 250 shares of plaintiff's stock, together with 250 shares belonging to one W. H. Wood (the appellant in the case consolidated with this), to one Eber B. Ward; and, as part consideration for said sale, the said Lawrence received the real estate described in the complaint, taking the deed therefor in his own name individually, also receiving a large amount of cash, besides other property; that the sum of $23,587.50 of the amount of cash so received by the said Lawrence was applied by him in taking up an indebtedness against the said Eureka Mining Company; that plaintiff was the owner of one-eighth of the total number of shares of stock so sold; that the said real estate and the said $23,587.50 were received by the said Lawrence in trust for plaintiff to the extent of an undivided one-eighth interest; and that the balance of the consideration received by the said Lawrence for the sale

of said stock was, immediately after said sale, distributed between the said Lawrence, the said plaintiff, and the said Wood, according to their respective interests. (*Finding III, R., pp. 17–18.*)

3. That, in recognition of said trust, as above, the said Lawrence executed and delivered to plaintiff the declaration of trust, dated November 9, 1872, set forth in the bill of complaint and in Finding VI. (*R., p. 18.*)

4. That on November 9, 1872, the said Eureka Mining Company executed to one Theodore M. Tracy, trustee, a certain mortgage to secure the payment of $43,587.50, the said Tracy taking and holding said mortgage as trustee for Lawrence—$23,587.50 of which said sum represented the indebtedness of said mining company, which had been taken up by Lawrence, as aforesaid, with a portion of the proceeds of said sale of stock, and the remaining $20,000 thereof represented an indebtedness due Lawrence individually; and that said mortgage was not given to secure, in whole or in part, any indebtedness due from said company to plaintiff, or to said Wood, on account of services rendered by them, or either of them, to said company. That afterwards, and prior to August 26, 1874, Tracy assigned said mortgage to Lawrence, and said Lawrence received the same in trust for said plaintiff to the extent of his one-eighth interest in said sum of $23,587.50, and no more. (*Findings IV and V, R., p. 18.*)

5. That, thereafter, Lawrence foreclosed said mortgage, under decree dated July 27, 1876, and a deed of conveyance of the mining property of said company was thereafter duly executed by the United States Marshal to said Lawrence; and that said Lawrence thereafter, March 13, 1877, conveyed all that he had acquired

under said mortgage, and the foreclosure thereof to the Eureka Hill Mining Company, having a capital stock of 10,000 shares, and in part consideration for said conveyance the said Lawrence received 3,000 shares of the capital stock of said company. That Lawrence took said shares of stock in his own individual name, on said date, March 13, 1877, and held and retained the same in his own name until his death, December 28, 1888, and claimed and received the dividends thereon, and in all respects held and treated said shares of stock and dividends received as his own property, and did not, at any time, recognize any right or interest therein belonging to plaintiff. That the dividends received thereon, at the time of the commencement of this action, amounted to $94 per share, and at the time of the hearing of this case to $124 per share. (*Findings VII, VIII, and IX, R., pp. 18–19.*)

6. That, on September 27, 1875, the said Lawrence wrote to the said W. H. Wood a letter, in which he stated that the interest of the said Wood in the mortgage, above referred to is one-eighth of $25,000, $3,125; and also makes reference to the removal of injunction in the foreclosure suit.

That, on December 26, 1875, said Lawrence also wrote to said Wood, stating that the suit against him, Wood and Whitney, had been discontinued, the receiver discharged, and the property placed in his, Lawrence's possession. Both letters are set forth in full in the finding. (*Finding X, R., p. 19.*)

7. That at no time after December 26, 1875, did plaintiff claim or demand of Lawrence any portion of said mortgaged property, or of the proceeds thereof, or any dividends received thereon, until April 6, 1888, nor did Lawrence recognize or admit that plaintiff had any interest therein. (*Finding XI, R., p. 20*)

8. That on July 18, 1876, the said Wood wrote to the plaintiff, referring to their interest in the mortgage, and suggesting that they should commence and claim their rights very soon, by suit, if in no other way. The letter was received by plaintiff in due course of mail, and was produced by him on the trial of this case.

Thereafter, March 1, 1880, said Wood again wrote to plaintiff about their claim against Lawrence, stating that it was time something should be done, and done promptly and fearlessly. This letter was received by plaintiff in due course of mail, and was produced by him on the trial of this case.

Copy of each letter is set forth in full in the finding. (*Finding XII, R., pp. 20, 21.*)

9. That plaintiff had actual knowledge of the said conveyance to the Eureka Hill Mining Company at the time same was made, and of the terms on which made; and he also had actual knowledge as early as March, 1880, that Lawrence denied and repudiated any alleged interest or claim of plaintiff in or to any part of said 3,000 shares of stock, or in the dividends declared and paid thereon, or in any of the property mentioned in the complaint. That in part consideration for said conveyance to said Eureka Hill Mining Company, under date of March 13, 1877, in addition to said 3,000 shares of stock, Lawrence received a quartz mill, and, as early as the summer of 1877, plaintiff was informed by said Lawrence, in person, that he had sold and disposed of the machinery of said mill, and had actual knowledge thereof, but plaintiff did not then, nor has he at any time since, made any demand upon Lawrence, or his representatives, for any part of the proceeds of said sale, nor did he then, nor has he since, made any inquiry as to the amount realized by Lawrence from said sale, although ignorant of the terms thereof. (*Finding XIII, R., p. 21.*)

10. That, as early as 1881, plaintiff knew that said mining company had declared and paid a dividend of $1 per share upon all of its capital stock; and as early as November, 1885, the plaintiff had actual knowledge that said mining company had theretofore declared and paid dividends upon said capital stock aggregating $54 per share, and that Lawrence had received said dividend of $54 per share on each and all of said 3,000 shares; but never, at any time, prior to the demand hereinafter referred to, did plaintiff make any demand or request of said Lawrence for any part or portion of the proceeds of said dividends. (*Findings XIV and XV, R., pp. 21, 22.*)

11. That, during the years 1877, 1878, 1879, 1880, 1881, and 1882, the plaintiff met and conversed with said Lawrence almost weekly in Salt Lake City, and met him frequently in said city during the years 1883 and 1884. That from April, 1877, until the month of ———, 1885, Lawrence resided in Salt Lake City continuously, and was absent on rare occasions only, and for brief periods. That he returned to said city on the —— day of October, 1885, and remained there continuously thereafter until February 10, 1886, and returned again November 1, 1886, and remained in said city continuously until January 25, 1887. That in November or December, 1885, and after plaintiff had actual knowledge of the receipt by Lawrence of said $54 per share on 3,000 shares of said stock, plaintiff met and conversed with Lawrence in Salt Lake City, but made no demand upon or request of him for any part of said dividends. That during the latter part of 1887 the mind and memory of Lawrence became so impaired by disease as to make it impossible for him to attend to ordinary business affairs, and from thence to his death such impairment to his faculties daily increased, so that from the first of the year 1888, until his death, he was unable to

comprehend any matter of business sumbitted to him. That plaintiff never made any demand upon or request of said Lawrence for any portion of said 3,000 shares of stock, or for any portion of the dividends which had been declared and paid thereon, or for any part or portion or interest in the real estate mentioned in the complaint, or the rents, issues, and profits thereof prior to April 6, 1888, on which date he did make a formal demand on said Lawrence for an accounting, but that plaintiff well knew for many months prior to said demand that said Lawrence had been deprived of his reason and mental faculties. (*Finding XVI, R., p. 22.*)

And, as conclusions of law, from the foregoing *facts*, the court found:

1. That the said Lawrence was, at the date of his death, the owner of all the property, real and personal, described in the complaint, free from any and all trusts in favor of plaintiff.

2. That so far as said action seeks to establish a trust in favor of plaintiff in the real estate mentioned in the complaint, and to obtain an accounting for rents, etc., the same is barred.

Sec. 180, Code of Civil Procedure, Utah Territory.

3. That so far as said action seeks to establish a trust in favor of plaintiff in any portion of said 3,000 shares of stock, or to any portion of the dividends declared and paid thereon, the same is barred.

Sec. 201, *id.*

4. That the plaintiff, by his laches and inexcusable neglect and delay, has barred and precluded himself of and from any relief in this action.

5. That plaintiff take nothing by his suit. (*R., pp. 22–23.*)

Brief.

At the time of the preparation of this brief, we have not seen the brief on behalf of appellant in either case, the same not yet having been filed, and should it hereafter appear that we have, for that reason, omitted to reply to any of the points intended to be urged on behalf of said appellants, or either of them, we shall ask leave to reply to same on the oral argument of the cases.

In this brief, we shall invite the attention of the court to the assignment of errors, set forth in the printed Record herein, (*pp. 312–315,*) and which assignment, it is believed, embraces all the questions heretofore insisted upon on behalf of said appellants in the trials below, both in the District and Supreme Court of the Territory of Utah.

The findings of fact by the trial court are conclusive upon the appellants in this Court, and the evidence adduced at the trial will not be reviewed for the purpose of determining whether such evidence is or is not sufficient to sustain the findings of fact.

The assignments of error, numbered IV to XV, both inclusive, are based upon the alleged insufficiency of the evidence, adduced at the trial, to sustain or justify certain of the findings of fact by the court, specifically enumerated; and it is now sought, on behalf of appellants, to have this court review the evidence in the case, for the purpose of determining whether or not such evidence is or is not sufficient to sustain or justify the said findings of fact by the court, so objected to.

It is submitted that this court can not and will not review the evidence in a case where the trial court has found and stated the *facts*, and that such finding by the trial court is conclusive upon appellants, and the only

question proper to be here reviewed, in connection with such findings of fact, is whether or not the conclusions of law, based upon the facts found, are correct, as well the decree rendered thereon.

In the case of *Stringfellow* v. *Cain* (99 U. S., 610), opinion by Mr. Chief Justice Waite, on appeal from the Supreme Court of the Territory of Utah, it was held, as correctly expressed in the syllabus, as follows:

"On an appeal to this court, the case, if otherwise properly here, will be determined upon the facts so stated. That if the findings of the District Court be sustained, and its judgment affirmed * * * such findings are, in effect, adopted by the said Supreme Court, and they, for the purpose of an appeal here, furnish a sufficient statement of the facts of the case, within the meaning of the act, 'concerning the practice in territorial courts and appeals therefrom,' approved April 7, 1874." (*18 Stats., 27.*)

In the case of *Stanley* v. *Supervisors of Albany* (121 U. S., 535), opinion by Mr. Justice Field, it was stated:

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. * * * Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered."

So, also, in the case of *Zeckendorf* v. *Johnson* (123 U. S., 617), opinion by Mr. Chief Justice Waite, it was held:

"But, on looking into the record, we discover that the errors assigned relate only to the sufficiency of the evidence to support the findings. These we can not consider. The findings of fact by the court below are conclusive, and can not be re-examined here. *The Abbotsford* (98 U. S., 440), and cases there cited."

And in the case of the *Idaho and Oregon Land Improvement Company* v. *Bradbury* (132 U. S., 509), opinion by Mr. Justice Gray, the syllabus correctly states what was there decided, as follows:

"On appeal from the decree of a territorial court in a proceeding in the nature of a suit in equity, this court can not consider the weight or sufficiency of evidence, but only whether the facts found by the court below support the decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence."

See, also, the case of *San Pedro, etc., Co.* v. *United States* (146 U. S., 120), opinion by Mr. Justice Brewer, where the court approves the ruling made in the case of *Idaho and Oregon Land Co.* v. *Bradbury* (*supra*), and says:

"Hence, notwithstanding the large volume of testimony taken and used in the court below has been incorporated into the record sent to us, we are not at liberty to review that testimony for the purpose of ascertaining whether the findings in the statement of facts are or are not in accordance with the weight of the evidence. This narrows materially the range of our inquiry."

Citing—

Stringfellow *v.* Cain, 99 U. S., 610;
Cannon *v.* Pratt, 99 U. S., 619;
Neslin *v.* Wells, 104 U. S., 428;
Hecht *v.* Boughton, 105 U. S., 235, 236;
Gray *v.* Howe, 108 U. S., 12;
Eilers *v.* Boatman, 111 U. S., 526;
Zeckendorf *v.* Johnson, 123 U. S., 617.

It is therefore respectfully but confidently submitted that said assignments of error, numbered from IV to XV, both inclusive (*R., pp. 312–314*), are not well taken, and can not and will not be considered for review in this court.

It was not error in the trial court to exclude the testimony of plaintiff on the ground of his incompetency.

Assignments numbered XVII, XX, and XXI complain of the alleged error of the trial court in ruling that the evidence of the plaintiff as to any matter of fact occurring before the death of Joab Lawrence, and equally within the knowledge of said plaintiff and the said deceased, can not be received in his own favor in this case, and is to be excluded; in excluding the testimony of said plaintiff as taken in a deposition in New York in a cause in which said plaintiff and said Wood were plaintiffs against the said Joab Lawrence, and in excluding the testimony of plaintiff as taken in his own behalf orally upon the stand, and in excluding him as a witness on the ground of his incompetency. (*R., pp. 25, 314–315.*)

The statutes of the Territory of Utah provide as follows:

"SEC. 3877. The following persons can not be witnesses:

* * * * * * *

"3. Parties, or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person as to any matter of fact occurring before the death of such deceased person and equally within the knowledge of both the witness and the deceased person." (Vol. II, Laws of Utah, 1888.)

This case certainly presents one of a claim against the estate of a decedent, and it would seem to be obvious that the testimony offered comes clearly within the terms of the statute, and that the same was for that reason properly rejected.

It was not error in the trial court to refuse to admit evidence as to the general reputation, integrity, and honesty of the plaintiff, the same not having been assailed.

Assignments of error numbered XVIII, XIX, and XXII complain of the alleged error in the trial court in refusing to admit evidence as to the general reputation, character for truth and veracity, integrity, and honesty of the plaintiff. (*R., pp. 314, 315.*)

The rule that one accused of crime may give evidence of good character as strengthening the presumption of innocence, and tending to negative guilt, does not obtain in civil actions, unless character is put in issue by the pleadings, or evidence of general bad character has been received against him.

In the case of *Pratt* v. *Andrews* (4 N. Y., 493–4), it was held as follows:

"The general rule is so well settled that authorities need not be cited to prove it; that a party to a civil suit can only give evidence of the good character of himself, his wife, servant, or witness, in answer to impeaching evidence on the other side."

In the present case the character of the plaintiff was not assailed in any way, and the evidence offered was clearly incompetent, and was properly rejected.

See 1 Greenleaf on Evidence (13th edition), §§ 54 and 55, and cases cited in notes.

Statute of Limitations.

The statute of limitations of Utah, so far as the same is applicable to the present case, provides as follows:

"Section 3141, s. 192. The periods prescribed for the commencement of actions, other than for the recovery of real property, are as follows:

"Section 3142, s. 193. Within five years.

"1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

"2. An action for the *mesne* profits of real property.

"Section 3143, s. 194. Within four years.

"An action upon any contract, obligation, or liability, founded upon an instrument of writing, except those mentioned in the preceding section.

* * * * * * *

"3145, s. 196. Within two years.

"1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, also on an open account for goods, wares, and merchandise, and for any article charged in a store account: *Provided*, That action in said cases may be commenced at any time within two years after the last charge is made, or the last payment is received."

On the 9th of November, 1872, the said Lawrence wrote to plaintiff, as follows:

"This is to certify that you are entitled to a one-eighth interest in the real estate, mining, and rolling-mill stocks, and in the $23,587.50, of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7, less the farm of 160 acres, which was given to A. A. Griffith. I have received of you 20 shares of Eureka stock, your one-eighth of the 160 shares which was given to Messrs. Griffith & Mayhue." (*Finding VI, R., 18.*)

Plaintiff, Wood, knew as early as September 27, 1875, that Lawrence denied that he had any interest in the mortgage (referred to in *Finding IV, R., 18*) by reason of the salary account. In a letter, written by Lawrence to Wood, on said date, he expressly stated: "Your interest in the mortgage is one-eighth of $25,000, $3,125." (*Finding X, R., 19.*)

It, also, appears in the case that both plaintiffs, Wood and Whitney, in July, 1876, were considering the neces-

sity of pressing their claim against Lawrence. In a letter written by Wood to Whitney, July 18, 1876, he stated:

"You know you and myself have about $17,000 of our money in the mortgage, beside our portion of the Detroit R. E., and, if necessary, I have some money left to present my claim in court for a fair and honest adjustment. It seems to me that we should commence and claim our rights very soon, by a suit, if in no other way—all I wish, is what is justly due me." (*Finding XII, R., p. 20.*)

So that, it clearly appears that, as far back as July, 1876, Wood was threatening to institute legal proceedings for the adjustment and settlement of the very matters of claim embraced in the present suit.

In another letter, from Wood to Whitney, dated March 1, 1880, he says:

"Yours came to hand some time since, and fully noted. What course is it best to take with Lawrence to bring him to a settlement? Will the law work in this case, this late day? Our claim may be good upon the Eureka, in case he should wish to sell, as I have his letter saying I was interested one-eighth in the mortgage and in the Detroit property. I think it is time something should be done, and done promptly and fearlessly, and a full exposure made if necessary. I am satisfied the mine can not be sold if our claim is put in the right shape. I think anyone can see it, and think we can claim our portion of his receipts in law. Drop me a line at once, as I now intend to start for the East, and home in about two weeks, and shall stop at Salt Lake if it may be best. Find out what he intends to do—I mean Lawrence. No other way but to take the bull by the horns. I fear him not." (*Finding XII, R., 20, 21.*)

It is clear from this that Whitney and Wood were and had been in correspondence in relation to their claims against Lawrence; and, further, that they recognized a resistance on his part to the validity of their claims, and that it was necessary to sue Lawrence.

The above-quoted letters show conclusively that Lawrence had repudiated the trust prior to that time, and that the plaintiff knew it, and was then considering the bringing of suit.

In March, 1877, when Lawrence made conveyance to the Eureka Hill Mining Company, and received the consideration therefor, as to which plaintiff had actual knowledge (*R., 21*), the trust had been fully performed by Lawrence, and nothing remained but to divide the proceeds among those entitled to share therein.

In this case it is contended that plaintiff's right of action would be barred within two years after the cause of action accrued; and that such cause of action would accrue, when, either by the direct words of Lawrence, or by his acts and conduct, notice of his adverse holding was brought home to the knowledge of plaintiff. The action in this case would be to enforce an obligation or liability arising out of a contract not in writing, and would be barred by sec. 3145, Laws of Utah, 1888, vol. 2, (*supra*).

Even admitting the writing referred to as the declaration of trust to be genuine, Lawrence did not therein refer to any of the personal property now claimed.

If, however, plaintiff's contention be correct, and the action is to be regarded as one arising under a contract in writing, then the bar of the statute would be within four years. (*Id., sec. 3143, supra.*)

If, however, this case does not fall within the provisions of either of said sections of the statute of limitations, it does fall within the general section (3150, s. 202) which provides: "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

According to either contention, the statutory period would have passed several times prior to the bringing of the action, and the claim of plaintiff is barred.

That the statute of limitation operates as a bar to the enforcement of a claim, such as is embraced in the present suit, is thoroughly settled by the authorities.

Take, for example, the case of *Phillipi* v. *Phillipe* (115 U. S., 156, 157), opinion by Mr. Justice Gray, where it was held as follows:

"Conceding what is contended for by the counsel for plaintiff, that the statute of limitations does not run against an express trust, it must be borne in mind that this rule is subject to the qualification that when the trust is repudiated by clear and unequivocal words and acts of the trustee who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the statute of limitations will begin to run from the time such repudiation and claim came to the knowledge of the beneficiary. (Gratz *v.* Provost, 6 Wheat., 481; Oliver *v.* Piatt, 3 How., 333; Badger *v.* Badger, 2 Wall., 87; Kane *v.* Bloodgood, 7 Johns. Ch. 90.)"

It is, therefore, insisted that under the facts in this case, as found and stated by the trial court, and adopted by and affirmed in the Supreme Court of the Territory, the claim herein sought to be enforced had been barred many years before the commencement of the action.

Laches.

In the present case the Record discloses that on the 13th day of March, 1877, Lawrence took in his own individual name the 3,000 shares of stock of the Eureka Hill Mining Company, and claimed and received the dividends thereon until his death, December 28, 1888, and did not at any time recognize any right or interest therein belonging to plaintiff. (*Finding IX, R., 19.*)

And as early as March, 1880, plaintiff had actual knowledge that Lawrence denied and repudiated any

alleged interest or claim in said stock or dividends thereon, or in any of the property mentioned in the complaint. (*Finding XIII, R., 21.*)

It further appears that as early as the summer of 1877 plaintiff had actual knowledge that Lawrence, as part consideration, had received and disposed of certain mill machinery, but made no demand therefor of said Lawrence; nor did he then, nor has he at any time since, made any inquiry as to the amount realized therefrom. (*Finding XIII, R., 21.*)

It also appears that plaintiff, as early as 1881, knew that the Eureka Hill Mining Company had declared and paid a dividend of $1 per share, and as early as November, 1885, knew that said company had declared and paid a dividend of $54 per share, and that Lawrence had received such dividend on said 3,000 shares of stock, and yet he made no demand until April 6, 1888, as hereinafter stated. (*Finding XV, R., 21, 22.*)

That from April, 1877, until and including the year 1884, plaintiff met and frequently conversed with Lawrence, and in November or December, 1885, plaintiff met and conversed with Lawrence; but notwithstanding plaintiff's knowledge as above, made no demand or request upon him for any part of said dividends. (*Finding XVI, R., 22.*)

During the latter part of the year 1887 the mind and memory of Lawrence became so impaired by disease as to render it impossible for him to attend to ordinary business matters, which impairment increased daily, so that from the first of the year 1888 until his death he was unable to comprehend any matter of business submitted to him. It is further found that plaintiff never made demand upon Lawrence for any portion of said 3,000 shares of stock, or for any part or portion of the dividends which had been declared or paid thereon, or for any part, portion, or interest in the real estate men-

tioned in the complaint, or the rents, issues, or profits thereof, until April 6, 1888, on which date plaintiff did make a formal demand; but plaintiff well knew for many months prior thereto that Lawrence had been deprived of his mental faculties. (*Finding XVI, R., 22.*)

In the case of *Hiller* v. *Waller* (12 Vesey, Jr., 226) the presumption arising from laches is said to be placed on the ground that a man will naturally enjoy his own property, and where he stands by for many years not objecting to the enjoyment by another person, it is to be presumed he has in some way lost his right to it.

In the case of *Phillipi* v. *Phillipe* (*supra*), the court say:

"It is well settled by the decisions of the Supreme Court of Alabama, that even in the absence of a statute of limitations, if twenty years are allowed to elapse from the time at which proceedings could have been instituted for the settlement of a trust without the commencement of such proceedings, and there has been no recognition or admission within that period of the trust as continuing and undischarged, a presumption of settlement would arise, operating as a positive bar. And the same rule has been laid down by this and other courts as the settled law of equity jurisprudence."

In the case of *Godden* v. *Kimmell* (99 U. S., 201), the court say:

"Stale claims are never favored in equity, and where gross laches is shown, and unexplained acquiescence in the assertion of an adverse right, courts of equity frequently treat the lapse of time, even for a shorter period than the one specified in the statute of limitations, as a presumptive bar to the claim. Time, it is said, is no bar to an established trust, which may be true in a case of concealed fraud, provided the injured party is not guilty of undue laches subsequent to its discovery. Circumstances of the kind form an exception to the rule, but the rule still is that when a party has been guilty of such laches in prosecuting his equitable remedy as would bar

him if his title was solely at law, it will be barred in equity from a wise consideration of the paramount importance of quieting title.

"When a party appeals to the conscience of the chancellor in support of a claim," says Mr. Justice Field, "where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or any formal plea of the statute of limitations contained in the answer. (*Marsh* v. *Whitmore*, 21 Wall., 185.)"

And again, in the case of *Speidel* v. *Henrici* (120 U. S., 387), opinion by Mr. Justice Gray, the same doctrine was stated, as follows:

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' (*Smith* v. *Clay*, 3 Bro. Ch., 640, note.) This doctrine has been repeatedly recognized and acted on here."

The same principle is stated in the case of *Mackall* v. *Casilear* (137 U. S., 556, 566), as follows:

"The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original trans-

actions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith, and reasonable diligence. (*Jenkins* v. *Pye*, 12 Pet., 241; *McKnight* v. *Taylor*, 1 How., 161, 168; *Godden* v. *Kimmel*, 99 U. S., 201; *Lansdale* v. *Smith*, 106 U. S., 391; *LeGendre* v. *Byrnes*, 44 N. J. Eq., 372; *Wilkinson* v. *Sherman*, 45 N. J. Eq., 413.)"

And, in the case of *Hammond* v. *Hopkins* (143 U. S., 250–274), the court say:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. (*Marsh* v. *Whitmore*, 21 Wall., 178; *Landsdale* v. *Smith*, 109 U. S., 391; *Norris* v. *Haggin*, 136 U. S., 386; *Mackall* v. *Casilear*, 137 U. S., 556; *Hanner* v. *Moulton*, 138 U. S., 486.)

* * * * * * *

"In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection

of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence."

In the case of Wood, plaintiff and appellant, the alleged declaration of trust was found among the papers of Lawrence after his death, and no explanation is offered why it was not in the hands of said plaintiff, if still in force. This would seem to most conclusively raise the presumption that the trust had been settled and the relation ended.

It seems unaccountable that the plaintiffs should have allowed Lawrence to have retained their property where they knew he disclaimed their rights, and yet acquiesce in his adverse holding from 1876 until 1888, and then when he, Lawrence, had become imbecile and himself unable to defend his rights, make, for the first time, a demand for an accounting.

In conclusion, it is submitted that the decree in this case was manifestly correct and proper, that it is fully warranted and sustained by the facts in the case, and that the same should be, in all things, affirmed.

JEREMIAH M. WILSON,
A. A. HOEHLING, JR.,
Counsel for Appellee.

269 MUSTER-ROLL OF CAPTAIN JOSEPH RENDLEBROCK'S COMPANY ("G") OF THE FOURTH REGIMENT OF CAVALRY, ARMY OF THE UNITED STATES (COLONEL RONALD S. MacKENZIE), FROM THE THIRTIETH DAY OF APRIL, 1874, WHEN LAST MUSTERED, TO THE THIRTIETH DAY OF JUNE, 1874.

No.	Names. Present and absent. (Commissioned and non-commissioned officers according to rank. Privates in alphabetical order.)	Rank.	Enlisted.				Last paid. (See Note 8.)		Due soldier for continuous service.		Due U. S.				Names. Present.	
			When.	Where.	By whom.	Period. Years.	By paymaster.	To what time.	Years.	Per month.	For clothing.		For tobacco.			
										Dolls	Dolls.	Cts.	Dolls.	Cts.		
	* *	*	*	*	*	.....	*	.....	*	.....	.....	.....	.....	.....	*	*
	* *	*	*	*	*	.....	*	.....	*	.....	.....	.....	.....	.....	*	*
	* *	*	*	*	*	.....	*	.....	*	.....	.....	.....	.....	.....	*	*
	* *	*	*	*	*	.....	*	.....	*	.....	.....	.....	.....	.....	*	*
	* *	*	*	*	*	.....	*	.....	*	.....	.....	.....	.....	.....	*	*
	Discharged.															
1	Downey, William F....	Pvt.....	Aug. 23, '69..	San Antonio, Tex.	Lieut. Hynes.....	5 yrs....	Maj. Judd.....	Feb. 28, '74..	.....	.....	.....	.....	.....	.....		(*)
	* *	*	*	*	*	.....	*	.....	.....	.....	.....	.....	.....	.....	*	*
	* *	*	*	*	*	.....	*	.....	.....	.....	.....	.....	.....	.....	*	*

Notes.

1. All officers and enlisted men are to be taken up on the rolls so soon as assigned by competent authority, whether they have yet joined or not, and to be dropped when similarly transferred. Care should be taken to have the names of soldiers and dates of enlistment correct.
2. All names and dates must be written out; dotting and using the word "ditto" are prohibited.
3. Under the head of remarks, the date when any assignment takes effect, the No., date, &c., of order therefor; the date of any officer or enlisted men joining, whether originally or from any absence; the date of an officer's assuming or being relieved from any command or special duty; the description of any special, extra, or daily duty on which officers or enlisted men may be; all changes of rank by promotion, appointment, or reduction, with date of same, and No., date, &c., of order; all authorized stoppages, fines, sentences, with No., date, &c., of order, &c.; in case of absence, the nature and commencement of, No., date, &c., of order, and period assigned for same (to be repeated on every roll while it lasts); if wounded in battle or injured on duty; if sick or confined, a remark to that effect, &c., and if confined by civil authority, nature of offense, whether discharged without trial, or, if tried, whether acquitted or convicted, with dates, &c., must be carefully stated opposite to the name of the person concerned, with everything else necessary, either to account fully for every individual to guide the paymaster or insure justice to the soldier and to the United States.

* * * * * * * * * *

8. The remark "discharge and final statements given" will be made opposite to the name of every discharged soldier to whom such papers have actually been given. Blank spaces under the head of "last paid" are to be filled as usual. The character given on the discharge will be noted on the roll.

Remarks.

* Discharged at Kerrville, Texas, May 1st, '74, by certificate of disability. Discharge and final statements given.

[ENDORSED ON BACK OF MUSTER-ROLL.]

270 Muster-roll of Company "G" of the Fourth regiment of U. S. cavalry from the 30th day of April, 1874, to the 30th day of June, 1874.

I certify on honor that this muster-roll is made out in the manner required by the printed notes; that it exhibits the true state of Captain Jos. Rendlebrock's Company (G) of the Fourth regiment of U. S. cavalry for the period herein mentioned; that the "remarks" set opposite the name of each officer and soldier are accurate and just, and that the "recapitulation" exhibits in every particular the true state of the — as required by Regulations and the Rules and Articles of War.

Station: Kerrville, Texas. JOS. RENDLEBROCK,
Date: June 30th, 1874. *Capt. 4th U. S. Cavalry, Commanding the Company.*

I certify on honor that I have carefully examined this muster-roll, and that I have mustered and minutely inspected the ——, the condition of which is found to be as expressed in my remarks hereunto annexed. *

Discipline: ——.
Instruction: ——.
Military appearance: ——.
Arms: ——.
Accouterments: ——.
Clothing: ——.

—— ——,
Inspector and Mustering Officer.

* It is made the special duty of the inspector and mustering officer to add the appropriate remarks touching "discipline," "instruction," &c., according to the facts exhibited in the course of his inspection, with such other remarks as may be necessary or useful for the information of the War Department.

267 MUSTER-ROLL OF CAPTAIN JOSEPH RENDLEBROCK'S COMPANY ("G") OF THE FOURTH REGIMENT OF CAVALRY, ARMY OF THE UNITED STATES (COLONEL RONALD S. MacKENZIE), FROM THE THIRTY-FIRST DAY OF OCTOBER, 1874, WHEN LAST MUSTERED, TO THE THIRTY-FIRST DAY OF DECEMBER, 1874.

No.	Names. Present and absent. (Commissioned and non-commissioned officers according to rank. Privates in alphabetical order.)	Rank.	Enlisted.				Last paid. (See Note 8.)		Due soldier for continuous service.		Due U. S.				Names. Present.	
			When.	Where.	By whom.	Period. Years.	By paymaster.	To what time.	Years.	Per month.	For clothing.		For tobacco.			
										Dolls	Dolls.	Cts.	Dolls.	Cts.		
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	
1	Patrick Donnery. . . .	1st sergt.	Apr. 15, '74..	Kerrville, Tex....	Capt. Rendlebrock...	5 yrs.....	Maj. Gibson.....	Oct. 31, '74.....	.....	.....	.....	.....	1	06		(*)
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	
20	Levey, Samuel J.....	Pvt.....	May 27, '71..	New York city...	Lt. Whedon.....	5 yrs....	Maj. Gibson.....	Oct. 31, '74.....	.....	.....	. . .	.....	1	06	Samuel J. Levey.	(†)
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	
24	Manson, Frederick L...	Pvt.....	Apr. 3, '73..	Philadelphia, Pa.	Capt. Robinson.....	5 yrs....	Maj. Gibson.....	Oct. 31, '74.....	....	.....	.....	....	1	06		(‡)
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	
	* * *	*	*	*	*	*	*	*	*	*	*	*	*	*	* * *	

Notes.

1. All officers and enlisted men are to be taken up on the rolls so soon as assigned by competent authority, whether they have yet joined or not, and to be dropped when similarly transferred. Care should be taken to have the names of soldiers and dates of enlistment correct.
2. All names and dates must be written out; dotting and using the word "ditto" are prohibited.
3. Under the head of remarks, the date when any assignment takes effect, the No., date, &c., of order therefor; the date of any officer or enlisted men joining, whether originally or from any absence; the date of an officer's assuming or being relieved from any command or special duty; the description of any special, extra, or daily duty on which officers or enlisted men may be; all changes of rank by promotion, appointment, or reduction, with date of same, and No., date, &c., of order; all authorized stoppages, fines, sentences, with No., date, &c., of order, &c.; in case of absence, the nature and commencement of, No., date, &c., of order, and period assigned for same (to be repeated on every roll while it lasts); if wounded in battle or injured on duty; if sick or confined, a remark to that effect, &c., and if confined by civil authority, nature of offense, whether discharged without trial, or, if tried, whether acquitted or convicted, with dates, &c., must be carefully stated opposite to the name of the person concerned, with everything else necessary, either to account fully for every individual to guide the paymaster or insure justice to the soldier and to the United States.

* * * * * * * * * *

8. The remark "discharge and final statements given" will be made opposite to the name of every discharged soldier to whom such papers have actually been given. Blank spaces under the head of "last paid" are to be filled as usual. The character given on the discharge will be noted on the roll.

Remarks.

*$2 per month, 5 years' service. On D. S. since Dec. 28, '74.
†On D. D. as company clerk.
‡On D. S. since Dec. 28, '74.

[ENDORSED ON BACK OF MUSTER-ROLL.]

268 Muster-roll of Company "G" of the Fourth regiment of U. S. cavalry from the 31st day of October, 1874, to the 31st day of December, 1874.

I certify on honor that this muster-roll is made out in the manner required by the printed notes; that it exhibits the true state of Captain —— —— (——) of the —— regiment of —— for the period herein mentioned; that the "remarks" set opposite the name of each officer and soldier are accurate and just, and that the "recapitulation" exhibits in every particular the true state of the — as required by Regulations and the Rules and Articles of War.

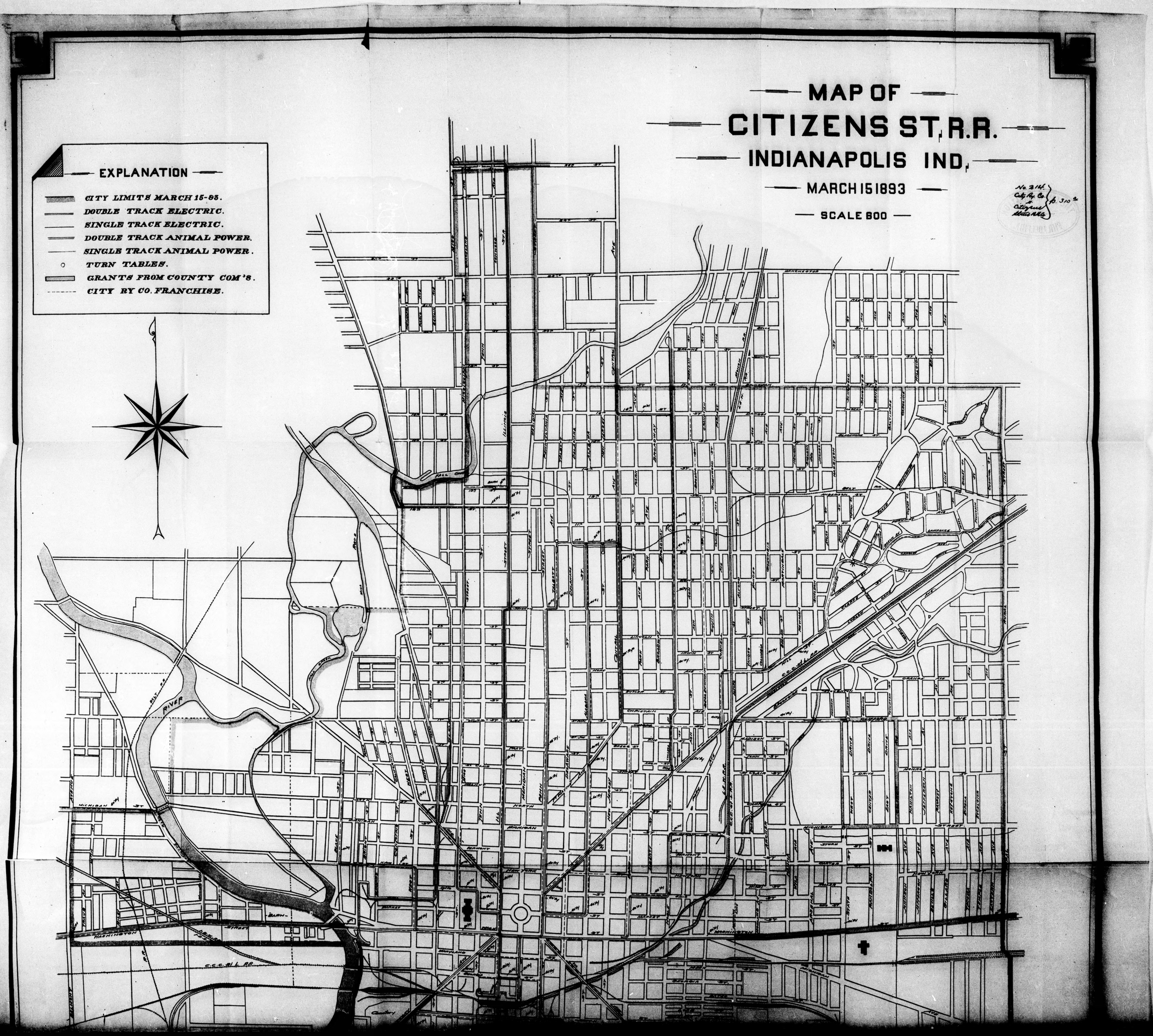
Station: Fort Clark, Texas. JOS. RENDLEBROCK,
Date: December 31st, 1874. *Capt. 4th U. S. Cavalry, Commanding the Company.*

I certify on honor that I have carefully examined this muster-roll, and that I have mustered and minutely inspected the ——, the condition of which is found to be as expressed in my remarks hereunto annexed. *

Discipline: ——.
Instruction: ——.
Military appearance: ——.
Arms: ——.
Accouterments: ——.
Clothing: ——.

—— ——,
Inspector and Mustering Officer.

*It is made the special duty of the inspector and mustering officer to add the appropriate remarks touching "discipline," "instruction," &c., according to the facts exhibited in the course of his inspection, with such other remarks as may be necessary or useful for the information of the War Department.


MAP OF
CITIZENS ST. R.R.
INDIANAPOLIS IND.
MARCH 15 1893
SCALE 600
EXPLANATION
CITY LIMITS MARCH 15-93.
DOUBLE TRACK ELECTRIC.
SINGLE TRACK ELECTRIC.
DOUBLE TRACK ANIMAL POWER.
SINGLE TRACK ANIMAL POWER.
TURN TABLES.
GRANTS FROM COUNTY COM'S.
CITY RY CO. FRANCHISE.
RIVER
WASHINGTON
MICHIGAN
NEW YORK
MARYLAND
C.C.C. St L. RR.

C.S.BUTTS
ENGINEER,
- March 19-94 -

30 Sett. No. 2276.
Ledger page, 18372, 18449, 18767, 19198, 19524.
Fiscal year, 1877 & prior, 1878, 1879, 1880, 1881.
Bond, April 2d, 1878.

(Form 47.—Third Auditor's Office.)

HENRY W. HOWGATE, LIEUT. 20TH INF'TY, PROPERTY & DISBURSING OFFICER, SIGNAL SERVICE, U. S. A., IN ACCOUNT WITH THE UNITED STATES, DR.

Date.	Period. April, 1878, to September, 1880, inclusive. Consolidated settlement.	1887 and prior years.			Fiscal year 1878.			Fiscal year 1879.				Fiscal year 1880.						Fiscal year 1881.			Total.
		Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Mil. teleg'h lines from Bismarck to Ft. Ellis.	Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Extension of mil. teleg'h lines by way of new post on Milk river.	Extension of mil. teleg'h lines from Fort Elliott	Teleg'h cable from the mainland in Rhode Island to Block Island. No year.	Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	
	To general account money advanced.																				
	For amount taken up by the officer on his acc'ts current for April, 1878, as on hand from March, 1878	169 31	2 45	12 50	3,626 95	7,582 12	209 11														11,602 44
	For this sum, acknowledged by the officer on his acc'ts current, viz:																				
	One account current for April, 1878					50,000 00															50,000 00
	Two " " " May, "		16 08		1 35	25,087 14															25,104 57
	One " " " June, "					25,000 00															25,000 00
	Two " " " July, "					47 98		2,500 00	20,000 00	10,000 00	25,000 00										57,547 98
	One " " " August, "							2,500 00	20,000 00	10,000 00											32,500 00
	Two " " " September, "				12 52	12 97			30,000 00												30,025 49
	Two " " " October, "					96 73			30,000 00	13,500 00	25,000 00										68,596 73
	One " " " November, "							5,500 00	25,500 00	6,500 00											37,500 00
	One " " " December, "								30,500 00												30,500 00
	One " " " January, 1879								30,567 75												30,567 75
	One " " " February, "								30,500 00												30,500 00
	One " " " March, "								30,500 00												30,500 00
	One " " " April, "								35,000 00												35,000 00
	One " " " May, "								33,750 00												33,750 00
	One " " " June, "							63 29	33,774 17												33,837 46
	Two " " " July, "								103 37			5,250 00	31,250 00	25,000 00	20,000 00	20,000 00					101,603 37
	One " " " August, "											5,250 00		25,000 00							30,250 00
	One " " " September, "												28,750 00								28,750 00
	Two " " " October, "							1 06	12 33				35,000 00								35,013 39
	Two " " " November, "								14 00				70,000 00								70,014 00
	One " " " December, "												35,000 00								35,000 00
	One " " " January, 1880												35,000 00			160 62					35,160 62
	One " " " February, "												35,000 00				15,000 00				50,000 00
	One " " " March, "												35,000 00								35,000 00
	One " " " April, "												35,012 73								35,012 73
	One " " " May, "												35,000 00								35,000 00
	Two " " " July, "												6 84					3,000 00	50,000 00	22,000 00	75,006 84
	One " " " August, "																		25,000 00	20,000 00	45,000 00
	One " " " September, "																	179 20			179 20
	For this sum, being the amount of vou's 98 & 342 B, June, 1880, for which the officer claims credit, but failed to furnish his vouchers in support thereof.												19 75								19 75
	For this sum, being the proceeds of his check 2173, dated April 8th, 1880, and drawn on the Treasurer of the U. S. in favor of W. B. Moses or bearer, for $9,200, there being no vouchers in the accounts of Lieut. Howgate showing that Mr. Moses either furnished supplies or rendered services which would warrant the payment to him of the amount of said check												9,200 00								9,200 00
		169 31	18 53	12 50	3,640 82	107,826 94	209 11	10,564 35	350,221 62	40,000 00	50,000 00	10,500 00	384,239 32	50,000 00	20,000 00	20,160 62	15,000 00	3,179 20	75,000 00	42,000 00	1,182,742 32
	Due the United States								24,131 54				51,851 48						32,630 12	24,642 08	133,255 22

(Form 47.—Third Auditor's Office.)

HENRY W. HOWGATE, LIEUT. 20TH INF'TY, P. & D. OFFICE, SIGNAL SERVICE, U. S. A., IN ACCOUNT WITH THE UNITED STATES, DR

Date.	Period. Contra.	1877 & prior years.			Fiscal year 1878.			Fiscal year 1879.				Fiscal year 1880.						Fiscal year 1881.			Total.
		Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Mil. teleg'h lines from Bismarck to Ft. Ellis.	Signal service.	Observation and report of storms.	Construction, maintenance, & repair of mil. teleg'h lines.	Extension of mil. teleg'h lines by way of new post on Milk river.	Extension of mil. teleg'h lines from Fort Elliott.	Teleg'h cable from the main land in Rhode Island to Block island. No year.	Signal service.	Observation and report of storms.	Construction & maintenance & repair of mil. teleg'h lines.	
March 25, 1884	By requisition No. 9728								377 12												377 12
" " "	" " " 9729								3,366 34												3,366 34
	" general account money advanced—																				
	For this sum, being amount allowed in the adjustment of his accounts, to wit:																				
	Disbursements April, 1878, one account current				2,648 37	48,071 98	65 55														50,715 90
	" May, " one " "				758 95	8,410 68	29 65														9,199 28
	Deposit " " one " "				1 35	83 64															84 99
	Disbursements June, " two " "		2 75		187 00	28,983 72	47 52														29,220 99
	" July, " three " "		15 00			13,443 71	16 24	411 66	13,582 88	1,287 83											28,757 32
	Transfers " " one " "									7,000 00											7,000 00
	Deposit " " one " "	169 31		2 42																	171 73
	Disbursements August, " two " "					8,732 63	9 70	941 34	14,752 00	1,210 72	5,290 37										30,936 76
	Transfer " " one " "									5,000 00											5,000 00
	Disbursements, September, " two " "				15 00	27 00		861 90	18,719 60	5,453 69	19,154 39										44,231 58
	" October, " two " "					92 50		1,196 22	27,305 31	8,326 09	4,518 41										41,438 53
	" November, " two " "				20 86			1,518 96	20,637 63	299 38	5,670 47										28,147 30
	Transfer " " one " "									2,500 00	500 00										3,000 00
	Disbursements December, " two " "					6 00		643 15	15,905 36	1,914 66	4,603 05										23,072 23
	Transfer " " one " "									2,500 00											2,500 00
	Disbursements January, 1879, two " "					28 86		840 17	29,235 78	1,565 13	5,782 39										37,452 33
	Transfer " " one " "										3,000 00										3,000 00
	Disbursements February, " two " "					16 09		384 89	22,851 87	23 13	599 91										23,875 89
	" March, " one " "							1,764 32	38,452 89	77 97	416 53										40,711 71
	Transfer " " one " "									1,000 00											1,000 00
	Disbursements April, " one " "							409 45	32,940 27	942 28	363 40										34,655 40
	" May, " three " "			1 00			2 00	1,135 24	23,782 06	492 04											25,412 34
	" June, " one " "							127 00	21,302 58	53 72	101 08										21,584 38
	Deposit " " one " "		78	9 08																	9 86
	Disbursements July, " two " "							164 47	10,601 96	96 30		130 00	6,673 10	16,725 61	12,865 39	10,346 80					57,603 63
	Transfers " " one " "													2,000 00	1,000 00	1,000 00					4,000 00
	Disbursements August " two " "							159 85	23,460 51	145 59		65 00	16,395 38	5,542 49	3,151 92						48,929 74
	Transfer " " one " "													3,000 00							3,000 00
	Disbursements September, " two " "								63 00			540 15	12,950 47	5,277 10	1,000 00	4,000 00					23,830 72
	Transfer " " one " "															1,000 00					1,000 00
	Disbursements October " two " "								8,596 50			65 00	29,706 08	12,863 79	1,875 00	42 73					53,149 10
	Transfer " " one " "													500 00							500 00
	Disbursements November, " one " "											1,081 40	26,300 89	2,634 35		1,957 26					31,973 90
	" December, " one " "											4,474 56	44,717 46	490 14							49,682 16
	Transfers " " one " "															1,000 00					1,000 00
	Disbursements January, 1880, one " "											1,496 90	25,529 57	67 16							27,093 63
	" February, " one " "											1,037 45	30,761 64	713 68			181 14				32,693 91
	" March, " two " "								10 50			174 00	30,762 78	30 93							30,978 21
	" April, " two " "								46 50			394 86	24,393 16	33 24			13,273 81				38,141 57
	Transfer " " one " "														107 69						107 69
	Disbursement- May, " two " "								75			270 50	24,249 46	80 53			1,079 21				25,680 45
	" June, " two " "								8 42			724 14	25,036 62	40 98			465 84				26,276 00
	Deposit " " one " "				9 29	13	38 45														47 87
	Disbursements July, " two " "											29 40	19,457 19					1,688 78	9,237 33	5,726 48	36,139 18
	" August, " two " "												15,390 21			813 83		297 21	16,506 28	9,746 81	42,754 34
	" September, " one " "							5 72										40 00	5,034 85	388 19	5,463 04
	Transfer " " three " "								81 25	111 47		46 64	44 08					974 01	11,591 42	1,496 44	14,351 03
	Deposit " " one " "																	179 20			179 20
	Requisition 5981, April 14, 1881, being the amount deposited to cancel error by reason of his failure to furnish vouchers 98 & 342 B, June, 1880												19 75								19 75
	Due the United States								24,131 54				51,851 48						32,630 12	24,642 08	133,255 22
		169 31	18 53	12 50	3,640 82	107,826 54	209 11	10,564 35	350,221 62	40,000 00	50,000 00	10,500 00	384,239 32	50,000 00	20,000 00	20,160 62	15,000 00	3,179 20	75,000 00	42,000 00	1,182,742 32

2d Comptroller's Office, *October* 24, 1884.
LOUIS DUVAL.

Third Auditor's Office, *October* 7, 1884.
J. S. HATCH, Room 43.